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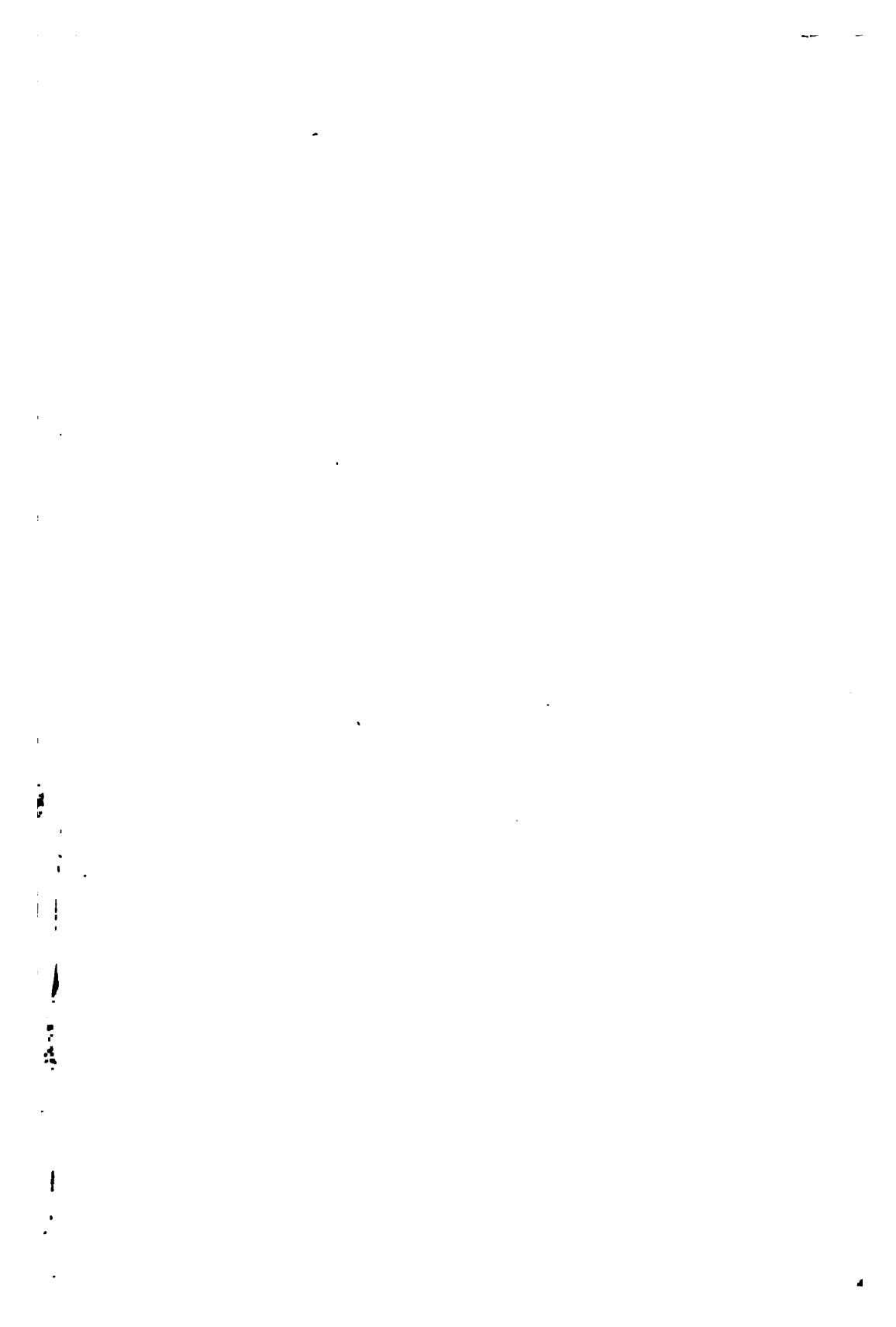
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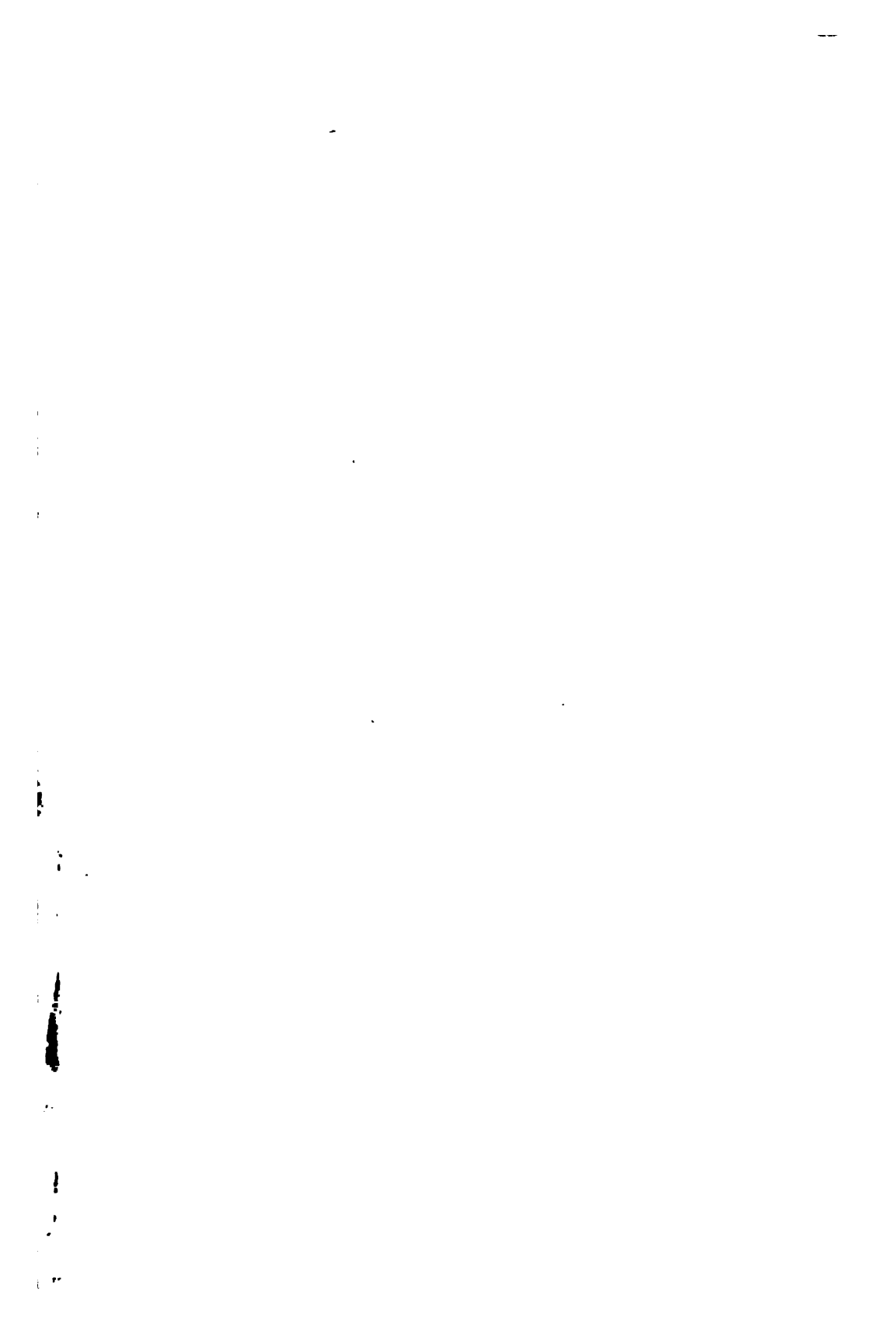
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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1893.

VOLUME XXXVI.

D. A. CAMPBELL,

OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

Rec. March 3, 1894

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OF
NEBRASKA.
1893.

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SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

The syllabus in each case was prepared by the judge writing the opinion, in accordance with rule 20.

A table of statutes and constitutional provisions cited, construed, etc., numerically arranged, will be found on page xliii.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1893.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.

HON. T. L. NORVAL, }
HON. A. M. POST, } JUDGES.

HON. ROBERT RYAN, }
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE, }

DAVID M. STUART, APPELLEE, V. GEORGE W. HERVEY,
APPELLANT, IMPEADED WITH CARLOS S. HAYES
ET AL., APPELLEES.

FILED JANUARY 3, 1893. No. 4862.

1. **Deeds: PROOF OF DELIVERY.** *Held*, That the proof fails to show a delivery of the deed or any equitable right to charge the defendant Hayes with the payment of the notes in question.
2. ——— : ——— : **LIABILITY OF GRANTEE FOR MORTGAGE DEBT.**
Where by the terms of a deed a grantee assumes a debt secured by a mortgage on the land and the grantee denies the debt and the delivery of the deed, to bind such grantee the proof must show an actual delivery, from which, if he retains the deed, an acceptance may be presumed. Very clear proof will be required where the property conveyed is of much less value than the incumbrance which it is alleged the grantee assumed.

APPEAL from the district court of Douglas county.
Heard below before WAKELEY, J.

McCoy & Olmsted, for appellant.

Holmes & Hays, for appellee Carlos S. Hayes.

Williams & Williams, for appellee Norman A. Kuhn.

E. E. Clippinger, for appellee David M. Stuart.

MAXWELL, CH. J.

This action was brought in the district court of Douglas county to foreclose a mortgage executed by the defendant Hervey, upon lots 2 and 6, in block 1, in South Exchange Place, in South Omaha. The mortgage was given to secure four notes, each for the sum of \$200. At the time of trial three of these notes were owned by the plaintiff and one by Norman Kuhn. It is alleged in the petition that Hervey sold these lots to Hayes and that in the conveyance he assumed the payment of the notes. This Hayes in his answer denies, but alleges that he had no knowledge of the execution of the deed until long after its date; that the deed was never delivered to nor accepted by him; that it was not recorded, and the defendant never has and does not now claim any right or title thereunder. The court below rendered a decree of foreclosure against Hervey, but dismissed the action as to Hayes, on the ground that the proof failed to show a delivery of the deed.

The testimony tends to show that in May, 1888, Hayes was the owner of one-half of Hayes' addition to Norfolk; that Wilson & Miller, a firm of dealers in real estate, had a half interest in said addition, although the title was in Hayes; that Wilson & Miller sold the lot in said addition to one Brady, and received therefor \$25 in cash and a tract of land in Dakota. This deed, for some cause, was not

Metropolitan Building & Loan Ass'n v. Van Pelt.

recorded. Wilson & Miller exchanged the Dakota land for the lots in question and assumed for Hayes the payment of said notes. Hayes claims that he had no knowledge of this transfer, and denies that Wilson & Miller had any authority to make the exchange as above stated. The proof in this case fails to show such authority. It also fails to show a delivery of the deed. In a case of this kind, where the grantee assumes a debt against the land conveyed, the proof must clearly show an actual delivery of the deed to the grantee; and particularly is this true where the property conveyed seems to be of much less value than the incumbrance. If a deed is duly delivered and retained by the grantee an acceptance may be presumed. In the case at bar the proof fails to show a delivery, hence there could be no acceptance, and fails to show any equitable grounds on which to base a recovery against Hayes. The judgment is right and is

AFFIRMED.

THE other judges concur.

METROPOLITAN BUILDING & LOAN ASSOCIATION, APPELLANT, V. VAN PELT BROS., APPELLEES.

FILED JANUARY 3, 1893. No. 4634.

1. **Promissory Note: FRAUD AND MISREPRESENTATION.** *Held*, That the proof fails to show that the note in suit was executed by the corporation without authority.
2. ———: **CONFLICT OF EVIDENCE.** The testimony upon the material questions of fact is conflicting, and the court is not justified in reversing the case.

APPEAL from the district court of Douglas county.
Heard below before WAKELEY, J.

Saunders, Macfarland & Dickey, for appellant.

Henry D. Estabrook, contra.

MAXWELL, CH. J.

This action was brought in the district court of Douglas county to restrain the defendant from disposing of a promissory note for the sum of \$1,500, given by the plaintiff and delivered to the defendants, and that said note be delivered up and canceled on the ground that it was obtained by fraud and misrepresentation. In their answer the defendants denied the fraud and misrepresentation and prayed for judgment on the note. There was a reply, which need not be noticed. On the trial of the cause the court found for the defendants and rendered judgment in their favor for the sum of \$1,733.25.

The testimony tends to show that in 1887 the defendants were doing business at Des Moines, Iowa; that in January of that year they came to Omaha and entered into a contract with the plaintiff wherein they agreed to remove their paint factory from Des Moines and locate the same in Omaha Heights, an addition to the city of Omaha, owned by the plaintiff. There is testimony tending to show that they promised to use diligence, enterprise, and zeal in carrying on the work; that they would employ a considerable number of hands (the parties do not agree as to the number), and would continue said works in operation for at least five years. In consideration of the foregoing the defendants were to receive certain lots and moneys from the Omaha Heights syndicate, and from the members of the plaintiff association individual notes to the amount of \$2,000. The works were removed to Omaha early in 1888, and the defendants commenced to manufacture there in March of that year and have continued to do so until the present time. It is true that it appears that a

Wyeth Hardware Co. v. Shearer.

corporation has been formed in which the defendants are the principal stockholders, and that this corporation is now conducting the business. In June of that year the note in question was given in lieu of the notes of the members of the plaintiff organization of the amount of \$2,000. It is claimed on behalf of the plaintiff that there was no authority to give this note and that it is void. In our view sufficient is shown to establish the authority of the corporation to execute the note, and it is unnecessary to discuss the doctrine of *ultra vires*.

The remaining question is one of fact, viz., as to the number of persons the defendant employed at Des Moines and would employ at Omaha. Upon this point there is a direct conflict in the evidence, and it is impossible for this court to say that the judgment is wrong. There is no material error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

WYETH HARDWARE & MANUFACTURING CO. V. SINO
SHEARER.

FILED JANUARY 3, 1893. No. 4913.

Guaranty: WEIGHT OF EVIDENCE. The testimony being conflicting, and the verdict not being against the clear weight of the evidence, the judgment is affirmed.

ERROR from the district court of Furnas county. Tried below before COCHRAN, J.

McClure & Anderson and *J. M. Johnson*, for plaintiff in error.

Wyeth Hardware & Mfg. Co. v. Shearer.

W. S. Morlan, G. W. Norris, and C. B. Roberts, contra.

MAXWELL, CH. J.

This is an action upon the following guaranty:

"To Wyeth Hardware & Mfg. Co., St. Joseph, Mo.—
GENTLEMEN: I hereby guarantee to you payment for any goods purchased by J. W. Shearer, to the amount of \$500. This guarantee to continue and remain in force until you are notified by me to the contrary.

"Dated at Beaver City, Febr. 6th, 1886.

"SINO SHEARER."

In the answer the defendant alleges that Sino Shearer went out of business in the spring of 1887, and settled with the plaintiff and paid it in full; that the defendant notified the plaintiff not to sell any more goods upon the guaranty, and demanded a return of the same; that in the year 1888 Sino Shearer again went into business, and purchased the goods in question on his own credit, and after due notice to the plaintiff not to sell any more goods on the guaranty.

The reply is a general denial.

On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered.

The principal ground upon which a reversal is sought is the want of sufficient evidence to sustain the verdict. Isaac Shearer, a son of the defendant, testified that he commenced the harness business, at Beaver City, in 1886; that he closed up his business in the spring of 1887, and settled with the plaintiff and paid it in full. He testifies as follows:

Q. State if you know anything about notice being given to the Wyeth Hardware Company to return the guarantee that your father gave in this case—had given to them when you went into business for the first time.

A. They were notified of it. There was; I wrote to them for that guarantee myself.

Q. Under whose instructions, if any one's?

A. My father's.

Q. Was that guarantee ever returned?

A. No, sir.

Q. Now then, what did you do with the letter that you wrote to them?

A. I sent a letter to them.

Q. Where did you send it—how did you send it?

A. I sent it by mail to the Wyeth Hardware Company.

Q. Where did you deposit the letter.

A. In the post-office at Beaver City.

Q. Where was it directed?

A. To St. Joseph, Mo.

Q. To whom?

A. William Wyeth Hardware Company.

Q. Was the postage prepaid on that letter?

A. Yes, sir.

Q. What, Mr. Shearer, did you do when you went out of business in 1887?

A. I went to Washington Territory.

Q. Go ahead, Mr. Shearer—how long were you gone?

A. I was gone something over six months.

Q. When you got back, did you go into the harness business again?

A. Not immediately.

Q. How soon after you got back?

A. Something like three months—along there—it might have been a little more.

Q. From the time you went out of business in Beaver City to the time when you again went into business, how much time elapsed?

A. Something nearly a year.

He further testifies:

Q. You say that there was a conversation that took

Wyeth Hardware & Mfg. Co. v. Shearer.

place between Mr. Shearer, the defendant—your father, and Mr. Curtain, and yourself, at the time you went into business again, or near that time?

A. Mr. Curtain and I were standing talking in the store, and father came in and I introduced Mr. Curtain to father, and told father his business, and father told me to be very careful what I bought, so that I would not buy too much, so I could pay for them, for that he would not be responsible for anything—for anything more that I bought.

Q. Where was Mr. Curtain at that time?

A. I don't know—he was right by—the conversation was directed to both of us.

Q. At the time you settled up business with the Wyeth Hardware Company and paid them when you went out of business, state to the jury whose money you used to make that settlement.

Q. Well, at the time you settled up with the Wyeth Hardware Company, at or about the time you went out of business the first time, state whose money you used to make that settlement.

A. I used father's.

The testimony of Sino Shearer, the father of J. W. Shearer, corroborates that of the son. He also testifies that when the guaranty was given in 1886, his son was under the age of twenty-one years, and that was the reason the guaranty was given; that in 1887 his son went out of business and paid the plaintiff in full up to that time; that the son left the state and was gone six months and did not go into business the second time for about six months after he returned.

This testimony is not denied. It also appears that the goods for which this action is brought were furnished after the son had gone into business the second time. Mr. Curtain denies that he was ever notified that the guaranty was withdrawn, as also do some of the members of the plaintiff's

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iff firm, but the evidence is so nearly balanced that we cannot disturb the verdict. The judgment must therefore be

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. CHESTER NORTON, V.
CHARLES VAN CAMP, COUNTY CLERK, AND JAMES
G. KRUSE, INTERVENOR.

FILED JANUARY 3, 1893. No. 5880.

ORIGINAL application for *mandamus* to compel the respondent, Charles Van Camp, county clerk of Knox county, to call to his assistance two disinterested electors of the twentieth representative district, and with them compare the abstracts of votes cast at the election held November 8, 1892, made by the canvassing boards of the counties of Knox and Boyd for representative, and returned to said county clerk of Knox county by the county clerks of said counties, and issue to the person appearing from said abstracts to have the highest number of votes a certificate of election as representative from said twentieth district in the legislature of Nebraska to convene January 3, 1893. Finding and judgment for relator. *Writ allowed.*

A. W. Agee, for relator.

A. J. Sawyer and Thomas H. Matters, contra.

MAXWELL, CH. J., dissenting.

I am unable to assent to the judgment of the majority of the court and I will as briefly as possible state the reasons for failing to do so.

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The proof shows beyond question that Boyd county has in fact been attached to Holt county from 1883 to 1890; that two years ago one of the representatives from the district comprising what is now Holt and Boyd counties was a resident of Turtle Creek precinct, in what is now Boyd county; that a supervisor from that precinct sat with the board of supervisors of Holt county and the latter county levied taxes in that county which were collected and paid. These things were a matter of record, which seem to have been kept in Holt county. This state of affairs continued until Boyd county was organized two years ago. There is no proof to the contrary on this point, so that it is established beyond a doubt. But it is claimed that this territory was not lawfully attached to Holt and therefore the proceedings in that regard are void. The testimony shows that in 1883 an election was held in Holt county to attach this territory to Holt; that at the election a majority of the votes cast upon that proposition was in favor of attaching the territory named to Holt, but that a majority of all the votes cast at that election was not in favor of the proposition. The county board, however, declared the proposition carried and thereafter exercised jurisdiction over that territory. It thus was, in fact, attached to Holt county and became to that extent organized territory, and was not within the provision of the statute as to unorganized territory. As a matter of fact the territory of what is now Boyd county has been attached to Holt for election purposes and not to Knox, from 1883 to the present time. It is true there is some proof tending to show that in 1890 some fifty or sixty persons came from what is now Boyd county into Knox county and voted. Some or all of these were challenged, and swore in their votes. The proof also tends to show that there was an exciting county division election which involved at least one county seat, and presumably that the votes were received by the judges and clerks on that account. These voters are shown to have

come from a portion of the territory between the Missouri and the Niobrara rivers, near to the town of Niobrara. So far as appears these votes were illegally cast, and instead of being an argument in favor of the relator are against him, because if the territory in question had in fact been attached to Knox, the electors thereof no doubt would have applied to the county board of Knox county to create one or more precincts in such territory and appoint election boards. This was done by Holt county, and the proof shows was not done by Knox county. To illustrate, in the early history of this state Lancaster county was attached to Cass county for election, judicial, and revenue purposes, but the people of Lancaster county did not go into Cass county to vote, but election precincts were organized in Lancaster county, where the electors voted and elected their own precinct officers. The votes when cast were returned to Plattsmouth and canvassed there and the records were kept there, and taxes levied by the authorities of that county. In 1862 a member of the legislature in Lancaster county, with three in Cass, was nominated by the electors of Cass and Lancaster counties and elected. Later, Saunders county was attached to Cass county for like purposes. Precincts were created in Saunders county by the proper county authorities of Cass county and the electors of Saunders county voted in their own county and elected their own precinct officers. In 1865 the electors of Cass and Saunders counties elected a member of the legislature from Saunders county, and three from Cass. Taxes were levied and collected by the proper authorities of Cass county and the records were kept at Plattsmouth. Now this is just what was done by Holt county. Will any one contend that the mere voting of fifty or sixty persons, who are claimed to be residents of Boyd county in an exciting county division and county seat election, establishes the right to count the votes of Boyd county for the relator in this case? The truth is, it is apparent, that the casting

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of these votes was a fraud upon those voters of Knox county, who were opposed to a division of the county, as the testimony shows that all but thirty-five votes were in favor of such division. There is danger of committing a like wrong upon all the electors of Knox county by counting the votes of Boyd county in this case. As a matter of fact, therefore, Knox county never has exercised, or attempted to exercise, jurisdiction over the territory comprising Boyd county. If it is said the law applies to all unorganized territory, the answer is, this was not unorganized territory, because it was attached to Holt county for election, judicial, and revenue purposes, and the law applies only to territory not otherwise assigned, so that all may be protected and represented. The language of the statute is:

"All counties which have not been organized in the manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county *directly east*, for election, judicial, and revenue purposes; *Provided*, That Sioux county shall be attached to Cheyenne county for all the purposes provided for in this section; *Provided further*, That if no county lies *directly east* of any such unorganized territory or county, then such unorganized territory or county shall be attached to the county *directly south*, or if there be no such county, then to the county directly north, and if there be no county directly north, then to the county directly west of such unorganized territory or county.

"Sec. 147. The county authorities to which any unorganized county or territory is attached shall exercise control over, and their jurisdiction shall extend to, such unorganized county or territory the same as if it were a part of their own county.

"Sec. 148. If two or more organized counties, or portions thereof, lie directly east of any unorganized county, then the portions of territory of such unorganized county which lie either north or south of a line running directly

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west and in continuation of the boundary line between such organized counties shall be attached to the organized county directly east of such territory, for all purposes of this subdivision." (Secs. 146, 147, and 148, ch. 18, Comp. Stats.)

Suppose, therefore, that the territory in question was unorganized, it is to be attached to the nearest organized county *directly east*. If there is no organized county directly east, then it is to be attached to the nearest organized county *directly south*. Webster defines the word "directly," "In a direct manner; in a straight line or course; without curving, swerving, or deviation." Directly east, therefore, means in a direct line on the same parallel east of Boyd county. An examination of a good map will show that Boyd county is northwest of Knox county; that the northwest corner of Knox county joins the southeast corner of Boyd county—the points of contact extending about seven miles, and that only a triangular point of Boyd county extends as far south as Knox; that Boyd county extends north to the 43d parallel, while Knox county at no point reaches within ten miles of that degree of latitude; that nearly all of Boyd county is north of the degree of latitude that passes along the north line of Knox county.

It is very evident, therefore, that Knox county is not directly east of Boyd county, but is southeast, while Holt county is directly south of Boyd county, and the latter county is and was properly attached to that county for election purposes. It is very clear to my mind that the authorities of Knox never had any right to interfere in the affairs of Boyd county, and they seem to have recognized this fact by not doing so.

But suppose that Knox county had jurisdiction over the territory in question, still the relator is not entitled to the writ. The certificate of nomination shows that the convention was held at Creighton; that a resident of

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Knox county was elected president of the convention, and another resident of that county secretary. There is no proof that a call for a convention of this kind was made by any one; or that the republicans of Boyd county were invited, or even notified to attend. A convention to be lawful must represent the whole district, otherwise it would be possible to pack a convention in the interest of particular individuals. No doubt the convention in this case was a fair convention of Knox county, but it should appear from the proof that Boyd county was invited to participate therein, otherwise it cannot be called a *district* convention. This is particularly true under the Australian ballot law of this state. It is conceded that no votes were ever before cast in that district as a *district for representative*. How, then, could it be said that the republican party of the *district* had at the preceding election cast one per cent of the votes? The statement is a mistake, and the only way a person could be nominated in the district, even if one existed, was by petition. In addition to this, the sample ballots do not contain the name of the relator. It is true the name of the relator is written in both the sample and official ballots, but this does not comply with the law. That requires the name to be *printed* in both. The proof also shows that certain friends of the defendant, after the *mandamus* proceedings, circulated a petition, as he claims, without his knowledge, to nominate him in Boyd county for the office in question; that the petition was signed by fifty-three names, but the clerk of Boyd county did not insert the defendant's name in either the sample or official ballots. Whether this was done with or without his knowledge does not in any manner affect this case, as if there was no legal district the casting of votes could not make it legal.

It also appears that the clerk had previously refused to insert the relator's name on the sample and official ballots, and that the district court compelled him to insert the same,

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which he did by *writing* in the relator's name without any designation of the office for which he was a candidate. The clerk evidently did not regard Boyd county as a part of the district and seems to have refused on that ground. The defendant was not a party to the *mandamus* proceedings, and we have no means of knowing what facts were before the district court, but as the defendant's name was entirely omitted from the ballots and the relator's written therein, it is evident to me that there was not a legal ballot cast in Boyd county for the relator. In a *mandamus* proceeding of that kind there is but little doubt that all the candidates for the particular office in dispute are proper parties defendant in order that they may protect their rights. The question would then be contested and cases determined on their merits. An *ex parte* order is granted almost as a matter of course and is entitled in a case like that at bar to but little consideration. The uniform rule adhered to by this court from the first has been to deny the writ of *mandamus* unless the right is *clear*. It must be free from doubt. Now, will any one say, in view of all the facts, that the relator's right to the seat is free from doubt? I think not. It is not a question of the success of one party or another. There is a principle underlying all questions of this kind that the will of the people as expressed through the ballot box shall govern.

This court from the first has compelled the counting of votes cast in pursuance of law in any legal subdivision of the state. The trouble with this case is, there was no representative district created either in fact or in law in which any votes were cast in Boyd county for the relator. There is no pretense that the records of the territory of Boyd county were kept in Knox county; that any taxes were ever levied there, or any jurisdiction of any manner or kind ever exercised, or attempted to be exercised, by the authorities of Knox county. All these things were done by Holt county under a colorable annexation of that county.

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to Holt. For seven years the jurisdiction of Holt county was undisputed. The legislature itself, in 1890, permitted a member to retain his seat who was a resident of Boyd county and who was elected by the joint votes of Holt and the territory of Boyd county, and that is the district to which Boyd county belongs. Here was annexation in fact under the forms of law. I believe the election in Holt county, in 1883, for the annexation of Boyd county, was held in pursuance of law, and if it was material it could readily be so demonstrated, but, in my view, it is not in this case material. No one will contend that a change in an election district, made in pursuance of apparent authority and an election held thereunder, can be treated as void. To illustrate: In 1860 a large part of Dodge county was added to Washington county and Fontanelle, the county seat, absorbed by that county. Now, suppose that a candidate for the legislature in Dodge county, in 1861, had ignored the change and been a candidate from the county of Dodge as it formerly existed, and suppose, including the old territory of Dodge, he had the highest number of votes, would he thereby have been entitled to a seat in the legislature as against his competitor? And would this court, by *mandamus*, have compelled the clerk of Dodge county to have issued a certificate of such election? I think not, because the court in a collateral proceeding, after election, in a contest between opposing candidates, will not pass upon the validity of the act creating the several districts, provided that they have been created under color of the law.

This, so far as I know, is the first attempt of the kind in this state. The sole ground on which the relator claims a right to a certificate is that Boyd county is directly west of Knox, but it is very clear that the territory of Boyd county is not directly west and not unorganized territory, and was, in fact, annexed to another county, and cannot be placed in the same district with Knox without

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doing violence to both the letter and the spirit of the law. As well have joined Cedar county to Knox and ask this court to compel the counting of the votes cast for a party in Cedar county in the alleged district composed of Cedar and Knox as in this case. The house of representatives is the only proper tribunal to examine into all the facts in the case and determine the rights of the parties. It must ultimately determine the question, and this court is not, in my opinion, warranted in interfering in behalf of the relator, but may safely trust the case to a co-ordinate department of the state government. I emphatically protest against the findings and judgment in this case, as in my view they are unwarranted by either the pleadings or proof, and are calculated to forestall the action of the house of representatives. I think the writ should be denied.*

STRAUT RICHARDS V. STATE OF NEBRASKA.

FILED JANUARY 3, 1893. No. 4591.

1. **Rape: ADMISSIBILITY OF EVIDENCE.** In a charge of rape, where no complaint was made for about seven months after the commission of the alleged offense and not until concealment by reason of pregnancy was no longer possible, *held*, that the statements of the prosecutrix were not admissible in evidence, but independent facts, such as the condition of her clothing at the time, are admissible.
2. ———: ———: **EVIDENCE.** Proof of deformity of prosecutrix, as by the want of a hand, is proper, as tending to show diminished power of resistance.
3. ———: ———. A charge of rape made months after the alleged commission of the same, where there were no marks of violence on the person or clothing of the prosecutrix, or evidence of excitement, or change in her demeanor, cannot be sustained unless there is very strong corroborating proof of the commission of the offense.

* For majority opinion see *post*, p 91.

36	17
36	363
36	715
37	447
36	17
45	832
36	17
52	72
55	133
36	17
58	811
36	17
60	115
66	436

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4. ———: ———. Where the accused testifies in his own behalf and admits the sexual intercourse, but denies the use of force, it is for the jury to determine the facts from the testimony.
5. ———: ———. INSTRUCTIONS taken together, *held*, to state the law correctly.
6. ———: TRIAL: CONDUCT OF JUROR. A juror will not be permitted to state to his fellow jurors, while they are considering their verdict, facts in the case within his own personal knowledge. He should make the same known during the trial and testify as witness in the case.

ERROR to the district court for York county. Tried below before SMITH, J.

George B. France, Robert Humphrey, and N. V. Harlan,
for plaintiff in error.

George H. Hastings, Attorney General, for the state.

MAXWELL, CH. J.

March 26, 1888, the prosecutrix, Blanche Sheeks, commenced a term of school about four and one-half miles west and one-half of a mile south of York, Nebraska. The term continued until June 10, 1888. She boarded from Monday until Friday at the house of Joseph J. Richards, father of the accused. She was seventeen and the accused nineteen years of age. They had been acquainted from childhood, having lived as neighbors for many years, but at this date the prosecutrix lived with her father in the city of York. In September and November of said year the prosecutrix taught another term of school at the same place. During this term she boarded at home, but kept her horse at the barn of Mr. Richards. During the spring term the prosecutrix was taken home on Fridays and back to her school on Mondays by some member of her family. The Richards family consisted of father, mother, Albert, Lot, Roy, Pearl, and the accused. On Friday or Saturday evening of the second week of school

no one of the family came for the prosecutrix, and she rode home in a buggy with the accused, who was going after the mail at York. She reached home after dark, spoke kindly to the members of her family, went into the kitchen and got a drink of water, went upstairs to her room, and was seen no more that night, except by her sister, with whom she slept. On the following Monday she went back to her school and continued to board with Mr. Richards during the remainder of the term, where, during all that time, the accused stayed as a member of the family. The school house was just across the public road from Mr. Richards' house. The accused remained a member of his father's family until about October 9, 1888, when, with his sister Pearl, he went to Lincoln, Illinois, on a visit, where the Richards family, prior to 1888, had resided and where two married sisters then resided. In November, 1888, the prosecutrix, being seven months in the family way, made a charge of rape against the accused, saying it was committed on the ride, the 6th or 7th of April, 1888. A requisition was obtained and the accused was brought back on the charge as far as Lincoln, Nebraska, where he escaped. He was afterwards arrested at Louisville, Kentucky, where he was attending a commercial school. In November, 1890, the case was tried and he was convicted. A motion for a new trial was made and overruled and the accused was sentenced for three years in the penitentiary. In impaneling the jury the court allowed the state to challenge J. W. Small and exclude him from the jury for cause. The evidence of Small, in substance, is, that he heard the evidence of one witness on the former trial; that he had not paid much attention to it; that he did not form or express any opinion in the case, and that he had no bias or prejudice. Substantially the same objections were made to the jurors Campbell, Miller, and Bohl, and they may be considered together.

A trial court, in impaneling a jury to serve in a partic-

ular case, has a very extensive discretion in discharging a person called as a juror, who might, as shown by his answers, not make an entirely fit or competent person to serve as a juror. This rule, however, should not be applied to retaining jurors. (*State v. Miller*, 29 Kan., 43; Maxw., Cr. Proc., 581.) In the case cited from Kansas it is said: "We do not think that the court below committed any substantial error as against the defendant, for, although it may be that Estlinbaum, the juror excused, was not so absolutely incompetent to serve as a juror that the court below could have committed material error by permitting him to serve as a juror, yet it cannot be doubted but that twelve men more competent could easily have been found and obtained to serve on the jury. We can hardly see how the court could commit substantial error by discharging any person from the jury when twelve other good, lawful, and competent men could easily be had to serve on the jury. (*Stout v. Hyatt*, 13 Kan., 232; *A., T. & S. F. R. Co. v. Franklin*, 23 Id., 74.) There is an immense difference between discharging a juror and retaining him. To discharge him can seldom, if ever, do harm, while to retain him, if his competency is doubtful, may do immense injury to one party or the other."

The reasons given by the Kansas supreme court are satisfactory. The court may, where it appears from the evidence that there is some ground for believing that the juror may not be entirely impartial, discharge him, and error will not lie, provided a fair jury is obtained. The first error assigned, therefore, is overruled.

2. "That the court erred in permitting testimony as to the physical condition of the prosecutrix at or about the time the offense is alleged to have been committed, as it appears that she has but one hand." In this there is no error, as the evidence tended to show her inability to resist the alleged force of the accused. The second error assigned, therefore, is unavailing.

3. The third objection is to the failure of the prosecutrix to make complaint for many months after the crime was committed, and proof of her statements when made. The charge is made as having occurred early in April, 1888, while the child was born in January, 1889. The prosecutrix, in her testimony, testifies that the connection was accomplished by force and intimidation, by the production of a revolver at a lonely place on the road some distance east of the Richards residence; that her drawers were torn by the accused in front and down one leg; that she did not immediately complain, because the accused told her that her certificate would be revoked and that she was fearful of certain injuries to herself in case complaint was made. She is corroborated as to the torn condition of her underclothing by her mother.

Robert Tucker, a witness called on behalf of the state, testifies that he and another person, armed with a requisition, went to Illinois and arrested the accused; that he had a number of conversations with him in regard to this occurrence; that at one time he freely and voluntarily said:

A. In referring to this matter, Mr. Richards told me that he was very sorry for his family. He said he had a nice family and his folks would be sorry for him; that he was sorry for his family and not for himself, but for his mother and his sisters and the connection of the family, and then he went on and talked in that line, and finally said he expected that he was elected for a term in the penitentiary, I think he termed it the "pen." He didn't seem to care so much for himself as the others.

Q. What did he say about Miss Sheeks?

A. He said that Blanche was a nice girl, and that the girl he had left in Illinois was a nice girl; he seemed to have several nice girls on hands just then.

The accused testified in his own behalf on his direct examination as follows:

Q. Do you know about the length of time you were coming in?

A. Why, no; I don't know exactly how long, but probably it wouldn't be later than about three-quarters of an hour; I don't know just exactly.

Q. You may state what occurred on the way coming, if anything.

A. Why, after we turned there into that road that runs there by Mr. Hibbard's we came to a house about forty rods from the corner, the Frenchman's house, and about forty rods east from that there is a large draw, and just before we got to the draw I made some advances towards Miss Sheeks, and the manner in which she received them, without any resistance to them, led me to believe that she was not unwilling for further advances, and as we drove down into the draw I asked her if she had any objections to our going down into the draw there, or insinuated in such a way that she knew; and so I proposed that we go down into it, and she said she hadn't; and we turned down the first big draw we came into—we turned down and went down in that about—I think it was about forty rods from the road—and the draw there is a branch of the draw there running west, a small draw—and we entered that and turned into this branch draw and drove so that people couldn't see us from the road, and there we stopped and I had connection with her there.

Q. And what did you do after that?

A. Well, I just put up the top; in the meantime I had the top down; I think I put up the top and straightened around and went on into York.

Q. Well, now, you may state what resistance, if any, she made.

A. No, sir; there was no resistance whatever. She was perfectly willing, if she had not been willing I should never have gone down in the draw.

From other portions of the testimony it appears that he planned the drive into York that evening, as he informed his mother at dinner, in the presence of the prosecutrix,

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that such was his intention and asked his mother to have an early supper. It will be observed that the sexual intercourse is admitted by the accused, but force is denied. He also denies the use of a revolver, or that he had one. This simplifies the question somewhat. The statements of the prosecutrix were not admitted in evidence and no objections on these grounds can be sustained. Such statements were not admissible as part of the *res gestæ*.

4. Objections are made to certain parts of some of the instructions, but in construing them they must be considered together. They are as follows:

"3. The material allegations contained in the information under which the defendant is being tried are as follows: That the defendant, in York county, Nebraska, on the 7th day of April, A. D. 1888, in and upon one Blanche Sheeks, then and there being, forcibly, violently, unlawfully, and feloniously did make an assault, and her, the said Blanche Sheeks, then and there forcibly, unlawfully and against her will, feloniously did ravish and carnally know, she, the said Blanche Sheeks, not being the daughter or sister of him, the said Straut Richards, and the said Blanche Sheeks being then and there above the age of fifteen years.

"4. Rape is defined to be the unlawful carnal knowledge by a man of a woman or a female child, forcibly and against her will.

"5. The charge made against the defendant is in its nature a most heinous one and well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty growing out of the nature of the usual circumstances connected with the commission of such a crime in defending against the accusation of rape. It is your duty to carefully consider all the evidence in the case and the law as given you by the court in arriving at what your verdict will be in this case. You must find on the part of the woman not merely a passive

policy or equivocal submission to the defendant, such resistance will not do. Voluntary submission on the part of the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given or how much force had theretofore been employed, it is not rape unless you find from the evidence beyond a reasonable doubt that the said Blanche Sheeks was prevented from making resistance and submitted to sexual intercourse with the defendant through fear of personal violence, as explained in the next instruction.

"6. The court instructs the jury that where a woman submits to sexual intercourse, through fear of personal violence, and to avoid the infliction of great personal injury upon herself, and to save her life, then such carnal intercourse is punishable as a rape, and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant had sexual intercourse with the said Blanche Sheeks, against her will, then the defendant may be guilty of the crime of rape, although the said Blanche Sheeks did not make the utmost physical resistance of which she was capable to prevent such intercourse, provided the jury further believe from the evidence, beyond a reasonable doubt, that the defendant threatened to use force and to do her great bodily injury, or to kill her in case she did not submit, and that she did submit to such intercourse through fear that defendant would do her great bodily injury, or kill her.

"6½. Under the law of this state, if the defendant avails himself of the right to testify and clearly and explicitly denies the commission of offense, then there must be testimony corroborating that of the prosecutrix to authorize a conviction; but it is not essential, in order to obtain a conviction, that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated

as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the guilt of the accused is established beyond a reasonable doubt.

"7. If the jury believe from the evidence that at the time the offense is alleged to have been committed the said Blanche Sheeks made no outcry, and did not complain of the commission of the offense to others, but concealed it for a considerable length of time afterwards, then the jury should take these circumstances into consideration with all the other evidence in determining the question of the guilt or innocence of the defendant, and whether a rape in fact was committed.

"8. The law throws around the defendant the presumption of innocence and requires the state to establish by the evidence beyond a reasonable doubt every material fact averred in the information under which the defendant is being tried; and it is the duty of the jury to give the defendant in this case the full benefit of this presumption and to acquit the defendant unless the evidence establishes his guilt beyond a reasonable doubt.

"9. You are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each and all of them. In determining the issues in this case you should take into consideration the whole of the evidence, giving to the several parts thereof such weight as you think they are entitled to. And in determining the weight to be given to the testimony of the several witnesses you should take into consideration their interest in the event of the case, if any such is proved; their conduct and demeanor while testifying; their apparent intelligence, fairness, or bias, if any such appears; the reasonableness of the story told by them; and all the evidence and circumstances tending to corroborate or contradict such witnesses, if any such are proved; and you may take into consideration any interest which any witness may have in the result

of this case, if any such is proved, and give to the testimony of such witness such weight as you think it is entitled to.

"10. The defendant has testified in this case as a witness in his own behalf, and in determining the weight to be given to his testimony you are at liberty to consider the degree of interest which he has in the result of this action and determine yourselves, from the testimony, the weight to be given to his testimony.

"11. By a reasonable doubt is not meant that the accused may possibly be innocent of the crime charged, but it means an actual doubt, having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary, prudent men with a conviction on which they would act in their most important concerns and affairs of life.

"12. If the proof of guilt amount to a moral certainty or such a moral certainty as convinces the minds of the jury as reasonable men, beyond a reasonable doubt, it is sufficient.

"13. If you believe that the evidence against the defendant has established all the material allegations contained in the information under which the defendant is being tried, beyond a reasonable doubt, you should convict the defendant.

"14. If the evidence against the defendant is not sufficient to establish his guilt beyond a reasonable doubt, it is your duty to return a verdict of not guilty.

"15. The court gives the jury with these instructions two forms of verdict, one finding the defendant guilty. After you have agreed upon your verdict, the verdict agreed upon should be signed by your foreman and returned into open court."

These instructions, taken together, are substantially correct, and appear to cover all phases of the proof.

Too much importance is given to criticism of the testimony of the accused, but the prejudice is not sufficient to cause a reversal. The conduct of the prosecutrix is inexplicable on the theory that the act was accomplished by force and against her will. So far as appears there was no visible mark of violence noticeable on either her person or clothing. She does not seem to have been excited, nor was anything noticed out of the ordinary course. Then the fact that she concealed the act as long as concealment was possible and intended, as she testifies, if nothing came of it to say nothing about it, is a strong circumstance against the theory of force. If the case rested upon her testimony alone it would not be sufficient to establish the commission of the offense. The testimony and admission of the accused, however, to some extent corroborates that of the prosecutrix. He admits the sexual intercourse and states where it took place; that he drove off the public road down the ravine some forty rods, and into a side ravine, may have been for the purpose he states, or perhaps where her cry for help could not be heard. The purpose must be gathered from the testimony. His conduct also since tended to show a sense of guilt, so that it is impossible for a court to say as a matter of law that the offense was not what the prosecutrix claims it to be, and that matter must be determined by a jury. (*Matthews v. State*, 19 Neb., 330; *Reynolds v. State*, 27 Id., 90.)

The accused filed an affidavit in support of the motion for a new trial in which he alleges that two of the jurors (naming them) stated to the jury while considering their verdict that the accused ruined other girls and was an improper person to run at large, and should be convicted on general principles. One of the jurors accused has filed an affidavit in which he denies many of the statements made by the accused. The denials, however, are not as broad as the

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accusation. The other juror makes no denial. If a juror knows any facts pertinent to the case it is his duty to make them known and testify as a witness. He cannot be permitted to testify before the jury as to facts which he claims are within his personal knowledge, because it is for the court to say what evidence is admissible in the cause. If the affidavit of the accused is true, one of the jurors named stated facts to the jury which were not admissible in evidence and were of a highly prejudicial character. The judgment must therefore be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NORVAL, J., not sitting. POST, J., concurs on the ground that there is not sufficient evidence to sustain the judgment of conviction.

J. J. IMHOFF V. JACOB E. HOUSE.

FILED JANUARY 3, 1893. No. 4889.

1. **Allegata et Probata.** A party is not allowed to allege in his petition one cause of action and prove another upon the trial. The *allegata* and *probata* must agree.
2. **Sufficiency of Evidence in Action for Services Rendered.** The evidence in the case *held* insufficient to support the verdict.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

F. I. Foss, and *Hall, McCulloch & English*, for plaintiff in error.

Winfield S. Strawn, *contra*.

36	28
38	353
36	28
41	790
36	28
42	828
36	28
144	30
36	28
52	444
53	461
54	280

NORVAL, J.

This action was brought by defendant in error against Frank I. Foss and J. J. Imhoff. There was no service of summons upon Foss, and upon a trial to a jury a verdict was rendered against Imhoff alone for \$800. A motion for a new trial was made and overruled, and judgment was rendered against him for the amount assessed by the jury, with costs of suit.

The cause of action set up in the petition was not established on the trial. It is charged in the petition substantially that House is a civil engineer and was employed by Foss and Imhoff in 1887 to make a survey of the Lincoln Belt Line railway; that in pursuance of said contract of employment he entered upon said work, furnishing the necessary assistance therefor; that he devoted, by self and assistants, four months' time to said employment, and that the same was reasonably worth \$200 per month, no part of which has been paid.

It will be noticed that the petition does not charge that there was any contract or agreed price plaintiff was to receive for his services, but he seeks to recover on a *quantum meruit* for the reasonable value of the services rendered. No testimony is to be found in the record as to their value, but the undisputed evidence establishes that prior to the commencement of the work it was definitely agreed that plaintiff should receive \$20 per day. The proof does not conform to the allegations of the petition. A party cannot allege one state of facts and prove another. The *allegata* and *probata* must agree.

If the variance between the pleading and proofs was the only objection to the verdict and judgment we might permit the plaintiff to amend his petition to conform to the proofs, inasmuch as no objection was made on the trial to the introduction of the testimony on that branch of the case. But there is another reason why the verdict cannot

Imhoff v. House.

stand. The clear preponderance of the evidence shows that the plaintiff did not contract with or perform the work for Mr. Imhoff personally. It is undisputed that prior to the making of the contract a company had been formed known as the Lincoln Belt Railway Company, which had a board of directors; Mr. Foss was vice president of the company and Mr. Imhoff was general manager thereof. The latter was authorized by the board of directors to employ some one to make a preliminary survey of the line of its proposed road. Of all these facts Imhoff and Foss both testify that the plaintiff House was informed before the contract of hiring was entered into, and he failed to deny it. Foss and Imhoff, as such officers of the company, employed House, not on their own account, but on behalf of the company. By the terms of the engagement the plaintiff was to hire the necessary assistants to do the work in the field, and he was to superintend the same, make all maps and profiles, as well as estimates of the costs of building the road. This was done as agreed. It appears that the actual work of making the surveys was performed in about a month by an engineer and assistants sent by plaintiff, who were subsequently paid for their services by said company. It is also undisputed that after plaintiff had completed his part of the work he made out and presented a bill to the Lincoln Belt Railway Company for his services and repeatedly urged its payment. The board of directors objected to the bill as being unreasonable and directed the secretary of the company to correspond with plaintiff with reference to the same for the purpose of procuring a reduction of the bill. The record shows that numerous letters passed between the secretary and Mr. House, without any adjustment of the claim being effected. Finally plaintiff brought this suit without ever having presented a bill to Imhoff personally for his services. The conclusion is irresistible, from the facts proved, that the plaintiff was employed by and the work was performed for the Lin-

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coln Belt Railway Company and that the jury were not justified in rendering a verdict against the plaintiff in error. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ANHEUSER-BUSCH BREWING ASSOCIATION, APPELLANT,
v. CREIGHTON MORRIS, ASSIGNEE OF THE FARMERS
& MERCHANTS BANK OF HUMBOLDT, APPELLEE.

FILED JANUARY 3, 1893. No. 5114.

36	31
36	333
36	31
42	908
36	31
49	788
52	3
54	727
36	31
61	184

1. **Banks: VOLUNTARY ASSIGNMENTS: PREFERRED CREDITORS.**
Where a bank collects money for another, it holds the same as trustee of the owner, and on the making of an assignment by the bank for the benefit of its creditors the trust character still adheres to the fund in the hands of the assignee, and the owner is entitled to have his claim allowed by the county court as a preferred claim.
2. ———: ———: ———: **WAIVER OF RIGHT TO PREFERRED CLAIMS.** In such case, where the owner files his claim with the county judge in the regular way, which is allowed like that of an ordinary creditor, no preference being given, from which allowance no appeal is taken, and he afterwards accepts from the assignee two dividends declared, he waives his right to afterwards insist upon the payment of his claim in full.
3. **Voluntary Assignments: PREFERRED CLAIMS: COUNTY JUDGE.** It is the duty of the county judge, at the same time he audits and allows a claim against an assigned estate, to determine whether or not it is entitled to preference, and if he finds that it is, to order the same paid as a preferred claim. His decision is, in effect, a judgment, which is conclusive, unless appealed from.

APPEAL from the district court of Richardson county.
Heard below before APPELGET, J.

Story & Story, for appellant:

The plaintiff's money was a trust fund. It can be followed into the assignee's hands, and under sec. 24, ch. 6, Comp. Stats., should be paid in full as a preferred claim. (*National Bank v. Insurance Co.*, 104 U. S., 54; *Harrison v. Smith*, 83 Mo., 210; *Peak v. Ellicott*, 30 Kan., 156; *Englar v. Offutt*, 70 Md., 78; *Farmers & Mechanics Bank v. King*, 57 Pa. St., 202; *McLeod v. Evans*, 28 N. W. Rep. [Wis.], 173.)

J. R. Wilhite and *Edwin Falloon*, contra.

NORVAL J.

On July 1, 1889, the Farmers & Merchants Bank of Humboldt made an assignment for the benefit of its creditors. Subsequently, Creighton Morris was elected by the creditors of the bank as assignee of the assigned estate, and qualified as such. Claims have been allowed by the county court of Richardson county against the estate aggregating more than double the appraised value of the assigned property. On September 13, 1889, appellant filed its claim as a creditor of said assigned estate to the amount of \$827.83, for moneys collected by the bank for appellant and not remitted, which was allowed by the county court October 17, 1889, as an ordinary claim, no preference being given. Subsequently, on October 28, 1889, a ten per cent dividend was declared, and appellant, as a creditor, took the ten per cent upon his claim allowed. Afterwards, on May 13, 1890, a six per cent dividend was declared, and appellant accepted its *pro rata* share. On the 6th day of June, 1891, appellant filed with the county court its verified petition alleging that its claim was for trust moneys and praying that the same should be paid in full as a preferred claim, which application was denied on July 27, 1891, and on the same

day a five per cent dividend was declared, but appellant declined to accept its *pro rata* share and appealed to the district court, where the decision of the county court was affirmed.

It is argued by the appellant, in effect, that the money collected for it by the bank was a trust fund in the hands of the latter, and that the making of the assignment did not divest the money of its trust character. There can be no doubt of the soundness of the proposition stated. This money collected by the bank did not belong to it, but to appellant, and it did not pass by the assignment to the assignee as a part of the assets of the bank. The assignee took the money subject to the trust in favor of the owner, and appellant was entitled under the provisions of the assignment law to have the same paid as a preferred claim against the estate, unless he has waived his right to such preference. The decisions cited in the brief of appellant fully sustain this conclusion, and we have been unable to find any in conflict therewith. (*Mo-Leod v. Evans*, 28 N. W. Rep. [Wis.], 173; *Farmers & Mechanics Bank v. King*, 57 Pa. St., 202; *Peak v. Ellicott*, 30 Kan., 156; *People v. City Bank of Rochester*, 96 N. Y., 32; *Cragie v. Hadley*, 99 Id., 131; *National Bank v. Ins. Co.*, 104 U. S., 54.)

The decision in *Wilson v. Coburn*, 35 Neb., 530, is clearly distinguishable from the case at bar. There an insolvent bank received a deposit of a sum of money from one Henry Wilson, and soon thereafter the bank made an assignment for the benefit of its creditors. The depositor filed with the county judge his claim, and a petition praying that he be adjudged a preferred creditor, and for an order for the payment of his claim in full. It was ruled that the fact that the bank, within the knowledge of its officers, received the depositor's money under circumstances which amounted to a fraud upon him, was not of itself sufficient to entitle him to a preference over other creditors

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from the funds of the bank in the hands of the assignee. The depositing of the money with the bank under the circumstances stated created the relation of debtor and creditor, and as the sum deposited had gone into and was mingled with the general funds of the bank, so as not to be capable of identification, or of being distinguished from the other assets of the bank in the assignee's hands, the depositor had no right to preference. In the case before us the transaction between the appellant and the assignor did not create the relation of a debtor and creditor, but the money collected constituted a trust fund in the hands of the bank for the benefit of the owner, and the assignment did not have the effect to divest it of such trust. The assignee stands in the place of the bank, and by the assignment he acquired no greater right to the money than the bank possessed.

Has appellant waived its right to insist upon the payment of its claim in full by having the same allowed as an ordinary debt against the estate, and by accepting two dividends from the assignee? It is plain that the answer must be in the affirmative.

Section 16 of the assignment law provides, among other things, that the county court shall fix a time within which claims against the assigned estate shall be filed.

Section 17 of the same act declares that "On the day following the day fixed under the provisions of the preceding section all uncontested claims shall, by the county judge, be allowed and entered of record, with the amounts thereof, in a book to be provided and kept for that purpose. Upon all contested claims the county judge shall order pleadings, as nearly as practicable like those in ordinary civil actions in said court, to be summarily made up, and thereupon said cause shall proceed in said court as in ordinary civil actions therein; but no such cause shall be continued for a longer time in the aggregate than sixty days from the day so fixed."

Section 18 provides that "Judgment in said action shall be that such claim or some amount thereof be allowed, or that the same be disallowed, or that the assignee have and recover from the person making the claim a certain amount. If the claim shall be allowed, judgment for costs shall be adjudged against the party or parties contesting the same. If the claim be allowed in part only, the court adjudicating the same shall apportion the costs or adjudge them as may be just. If the claim be wholly disallowed, or the assignee recover judgment, costs shall be adjudged against the claimant, but in no case shall the costs be paid out of the assigned estate except as in this act otherwise provided. In such cause the claimant shall be named as plaintiff, and the contestant or contestants as defendant. Judgment in favor of the assignee or for costs shall be collected as in other cases. Whenever any contested claim shall be finally allowed, or so much thereof as shall be finally allowed, shall be entered of record in like manner as other claims."

Section 19 provides that "no petition in error shall be allowed from the judgment of the county court upon a contested claim, but either party may appeal therefrom as in other cases."

Sections 22, 23, and 24 read as follows:

"Sec. 22. At the expiration of three months from the date of the inventory and appraisement, or sooner if, and as often as, the assignee shall be in the possession of sufficient funds, the county court shall order a distribution of all moneys in the assignee's hands, fixing the amount in dollars and cents to be paid to each person entitled thereto, and thereupon the assignee and his sureties shall become liable to such person therefor absolutely. The court may also enforce obedience to such order by the assignee by attachment for contempt, and may commit him to the common jail of the county, or any other suitable place of confinement and safe keeping until he shall comply therewith.

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"Sec. 23. As soon as the entire estate shall have been converted into money the county court shall make a like order for the final distribution thereof, which shall have the same effect and may be enforced in like manner as the order mentioned in the last preceding section.

"Sec. 24. Moneys coming into the hands of the assignee shall be distributed in the following manner: First—To the payment of fees and allowances of the assignee, county judge, clerks, sheriff, and officers. Second—To the payment of any public tax or assessment charged against the assignor or assignors or his or their property. Third—To the payment of preferred claims in full. Fourth—The balance shall be divided among the creditors so that the amount paid to each shall bear the same relation to the whole sum to be so divided that the amount of such creditor's claim shall bear to the aggregate amount of all the claims proven."

The statute authorizes and requires the county judge to pass upon claims filed against an assigned estate. Manifestly it is his duty at the time he passes upon and audits a claim to investigate and determine whether it is entitled to preference, and if he finds that it is, to allow the same as a preferred claim. His decision entered of record is in effect a judgment, which is final and conclusive upon all parties, unless an appeal is taken therefrom to the district court in the manner and within the time indicated by section 19 above quoted. (2 Black, Judgments, sec. 641; *Eppright v. Kauffman*, 1 S. W. Rep. [Mo.], 736.)

Appellant insists that the proper time for the county judge to determine whether the owner of a claim is entitled to preference is when the order of distribution is made. It will be conceded that in a suit to foreclose several mortgages, unless the priority of liens is determined when the decree is rendered, each lien-holder will share alike in the proceeds of the sale of the mortgaged premises. The time to determine in such a case the priority of liens clearly is

not after the sale of property. Applying the same rule to the settlement of insolvent estates we conclude that the status of a claim, whether it shall be preferred or not, must be fixed and determined by the county judge at the time the same is passed on and allowed by him, and not when he makes an order for the distribution of the money in the hands of the assignee. This view is strengthened by the reading of section 24, copied above, which declares the manner in which money belonging to an assigned estate shall be distributed. By the third subdivision of the section preferred claims are to be paid in full, and by the next subdivision the balance of the assets is to be divided among the creditors *pro rata*. From this it is plain that the status of the owner of each claim, whether entitled to a preference or not, must be judicially determined before there can be a distribution of the assets among the creditors of the assignor. The appellant's claim was allowed as an ordinary claim, and by failing to appeal therefrom, and by accepting as a creditor the two dividends declared, it waived its right to insist upon the payment of its claim in full as a preferred creditor. In reaching this conclusion we have not overlooked the decision in *McLeod v. Evans, supra*, wherein a contrary doctrine is stated. In view of our statutory provisions we do not regard that case as authority here. It follows that, as the decision of the county court and of the district court are in harmony with the views that we have expressed, the judgments of both courts must be

AFFIRMED.

THE other judges concur.

36	38
51	347
53	754
38	88
00	633

JAMES ASHFORD V. STATE OF NEBRASKA.

FILED JANUARY 3, 1893. No. 4708.

1. **Criminal Law: CONFESSIONS.** In a criminal prosecution the confession or admission of the accused is not alone sufficient to justify a conviction. That the crime charged has been committed must be established by other testimony. A voluntary confession may be proved for the purpose of connecting the accused with the offense.
2. ———: **BURGLARY: PROOF.** On a trial for burglary, under section 48 of the Criminal Code, an essential element of the crime is that the breaking and entering were committed in the night season, and unless this element is proved beyond a reasonable doubt, the accused should be acquitted.
3. ———: ———: **PLEADING.** In such a case the intent with which the breaking and entering were done must be proved as laid in the information.
4. ———: **SUFFICIENCY OF EVIDENCE.** Evidence in the case held insufficient to sustain the verdict and judgment.

ERROR to the district court for Douglas county. Tried below before CLARKSON, J.

A. C. Read and J. D. Pilcher, for plaintiff in error.

George H. Hastings, Attorney General, for the state.

NORVAL, J.

Plaintiff in error was tried and convicted in the court below of the crime of burglary and adjudged to be imprisoned in the penitentiary for the term of seven years. From that judgment he prosecutes error.

The information charges, in substance and effect, that the plaintiff in error, in the night season of the 23d day of February, 1890, in Douglas county, broke and entered a dwelling house owned by Jettie Reynolds, with intent to commit the crime of larceny.

It is urged that the evidence fails to support the verdict, and this is the only ground on which a reversal is asked.

It appears that Jettie Reynolds, the complaining witness, kept a house of prostitution in the city of Omaha, and that the plaintiff in error, who is a colored man, had been in her employ as a servant for some time prior to Christmas, 1889, at which date he was discharged. The evidence introduced by the state shows that about 2 o'clock on the morning of February 23, 1890, Jettie Reynolds, before retiring, locked the doors of her house, and when she arose about 9 o'clock in the forenoon of that day it was discovered that the doors of the house had been unlocked, and were open, and also that pots, containing plants, had been taken from a window in the pantry and placed upon the floor. It was further established that when plaintiff in error was arrested, which was a few days after the alleged burglary, he had upon his person several keys which would unlock the doors of the house in controversy.

Upon the trial one Sarah Payne, a cook in the employ of Jettie Reynolds, testified that on the evening of February 24th the accused had a conversation with the witness in which he stated that he entered the house about 4 o'clock in the morning of the day laid in the information, through the pantry window, which he had opened for that purpose, and that he went out the same way that he entered.

The defendant offered some testimony tending to prove an *alibi*.

This prosecution is brought under section 48 of the Criminal Code, which provides that "if any person shall, in the night season, willfully, maliciously, and forcibly break and enter into any dwelling house, shop, office, store house, mill, pottery, factory, water craft, school house, church, or meeting house, barn or stable, warehouse, malt house, still house, railroad car factory, station house, or railroad car, with the intent to kill, rob, commit a rape, or with intent to steal property of any value, or commit any felony,

Ashford v. State.

every person so offending shall be deemed guilty of burglary, and shall be imprisoned in the penitentiary not more than ten nor less than one year." One of the essential ingredients of the crime charged is that the breaking and entry were done in the night time. There is absolutely no testimony in the record as to the exact time the house was entered, except the admission of the defendant already referred to. Aside from his admissions the proofs only establish that the entry was made some time between the hours of 2 and 9 in the morning; but whether it was before or after daylight does not appear. There is also a lack of evidence as to the location of the Reynolds house, as to whether it is situated in the quiet or busy portion of the city and as to whether there were other residences or houses in the same vicinity. If located in the heart of the city the probabilities that the entry was made before daylight would be greater than if situated in a more sparsely settled portion. The admission of the defendant was competent evidence, not for the purpose of proving that the crime alleged had been committed, but for the purpose of connecting the accused with the offense. In a criminal prosecution every element constituting the crime must be proved by evidence other than the mere admissions or confessions of the accused. As was said by Maxwell, C. J., in his opinion in *Priest v. State*, 10 Neb., 399: "That a crime has actually been committed must necessarily be the foundation of every criminal prosecution, and this must be proved by other testimony than a confession, the confession being allowed for the purpose of connecting the accused with the offense." There can be no doubt of the correctness of the rule stated, and applying it to the facts in the case at bar it is clear that the evidence fails to show beyond a reasonable doubt that the house was broken and entered into in the night season, and therefore the crime of burglary is not made out.

We must not be understood as intimating that in a pros-

ecution for burglary the time when the breaking and entering into the building were committed must be established by direct proof, and cannot be inferred from the facts and circumstances surrounding the transaction, for, doubtless, that ingredient of the offense may be established like any other fact in a criminal case. What we wish to be understood as holding is, that, from the facts proved in this case, it could as well be inferred that the defendant broke and entered the house in the day-time as in the night season.

Again, there is no evidence as to the intent with which the breaking and entering were done. It is charged in the information that they were made with the intent to steal and carry away the goods and chattels of Jettie Reynolds. That such was the purpose will not be presumed from the mere fact of breaking and entering into the building. It is conceded that nothing was stolen therefrom by the defendant. Had there been, then, from that fact, it might be inferred that the object and purpose of the accused was larceny, since the presumption is that every sane person is presumed to have intended that which his acts indicate his intentions to have been. (3 Greenleaf Ev., sec. 13.) In this case there is no direct evidence of the object of the person in entering the building, which at the time was occupied by the complaining witness and others. If the intention or purpose was theft, why did he not accomplish it, as there was nothing to prevent him from so doing? It is not claimed that he was discovered in the act by any one, and that by reason thereof he was frightened away before carrying out his purpose. Doubtless there are cases where the motive with which a person breaks and enters a building may be presumed from the act alone. If one, in the night time, was to break and enter a building containing hardware, jewelry, clothing, or other property of value, belonging to another, and in which building there was no person at the time of the breaking, his act alone, unex-

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plained, would be very strong evidence that it was done for the purpose of committing the crime of larceny. But we do not think from the mere act of breaking and entering a house like the one in question, occupied at the time by the proprietress and others, that it must necessarily be presumed that the motive or intention was larceny rather than the commission of some other crime. In a prosecution for burglary, in determining the intention of the defendant, it is proper to consider the act of breaking and entering the building in connection with all the other facts and circumstances of the transaction disclosed by the evidence.

After having carefully examined the testimony in the bill of exceptions, we think it insufficient to sustain the verdict. The judgment is reversed and the cause is remanded to the court below for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN HAKANSON V. HENRY BRODKE.

FILED JANUARY 3, 1893. No. 4308.

1. **Replevin: DIRECTING VERDICT.** The refusal of the trial court to direct a verdict in the case for the defendant *held* proper.
2. ——— : **INSTRUCTIONS: SUFFICIENCY OF EVIDENCE.** *Held*, That there is no error in the charge of the court, and that the verdict is sustained by the evidence.
3. ——— : **ATTACHMENT: JUSTIFICATION OF OFFICER SERVING WRIT.** Following the repeated decisions of this court it was held that where a sheriff levies a writ of attachment upon property found in the possession of one not a party to the suit in an action of replevin therefor by such person, the office to justify the taking is required to show that the attachment writ was reg-

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ularly issued. In other words that the writ is regular on its face and was issued upon a sufficient affidavit by a court having jurisdiction of the parties and the subject-matter of the action.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

Charles W. Haller, for plaintiff in error.

Cavanagh, Atwell & Thomas, contra.

NORVAL, J.

This is an action of replevin brought before a justice of the peace by Henry Brodke against John Hakanson to recover possession of a small stock of goods, consisting of cigars, tobacco, notions, fruits, etc. The plaintiff recovered a judgment before the justice, whereupon the defendant appealed to the district court, where the plaintiff again recovered a verdict and judgment.

Error is assigned because the court refused to instruct the jury to return a verdict in favor of the plaintiff in error, and for the giving of the following instruction by the court on its own motion: "That the testimony having shown that the plaintiff at the time of the commencement of this action held a chattel mortgage on the stock of goods described in the petition, and that he had taken possession of the goods thereunder, and that the amount to secure which the mortgage had been given had not been paid, he, the plaintiff, was entitled to the possession of the property included in his mortgage as against the defendant in this action."

The evidence is uncontradicted that one Elias Grossfeld was the owner of the property in controversy on the 25th day of April, 1888, on which day he mortgaged the property to Brodke to secure the payment of \$100 borrowed money; that on the 6th day of the following July, Max Meyer attached the goods as the property of Grossfeld,

and on the same day, Brodke having claimed the property under his mortgage, the possession thereof was surrendered to one Catlin for the defendant in error; that on the following day John Hakanson, as constable, took the property under a writ of attachment issued by a justice of the peace at the suit of Meyer & Raapke against Grossfeld.

If we are able to comprehend the force of the testimony the only verdict which could have been properly rendered was the one returned by the jury. The validity of the chattel mortgage is not questioned. The mortgagee was in possession of the property, claiming title thereto by virtue of his mortgage, when the Meyer & Raapke attachment was levied. The officer attempted to justify under the writ of attachment which had been placed in his hands, yet none of the papers or proceedings in the attachment case were introduced at the trial, except the attachment writ. This alone was insufficient to justify the taking of the property from the possession of a stranger to the suit, but the officer should have gone farther and shown that the writ was issued upon a proper affidavit by a court having jurisdiction of the parties as well as the subject-matter of the suit. This has been repeatedly held by this court. (*Williams v. Eikenberry*, 22 Neb., 210, 25 Id., 721; *Oberfelder v. Kavanaugh*, 21 Id., 483; *Paxton v. Moravek*, 31 Id., 305; *Bartlett v. Chesebrough*, 32 Id., 339; *Winchell v. McKinzie*, 35 Id., 813.)

It is argued that defendant in error had parted with his interest in the goods in controversy to Catlin before Meyer & Raapke attached. This contention is not sustained by the evidence. While there had been some negotiations between Brodke and Catlin for the sale by the former to the latter of his interest in the property prior to the attachment, yet the sale had not been closed when the attachment in question was levied.

There being no conflict in the evidence, and the only conclusion which can be drawn from the facts and circum-

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stances proved is that the plaintiff below was entitled to the possession of the property at the commencement of the action, the trial judge did not err in refusing to direct a verdict for the defendant, nor in giving the instruction complained of. The judgment is clearly right, and is

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AFFIRMED.

THE other judges concur.

JAMES A. COSTELLO, SHERIFF, v. HENRY CHAMBERLAIN.

FILED JANUARY 3, 1893. No. 4857.

1. **Voluntary Assignments: PREFERRED CREDITORS.** A debtor in failing circumstances may lawfully prefer one or more of his creditors and secure such creditors by mortgage or conveyance absolute, provided the transaction is in good faith and not made with intent to defraud other creditors.
2. ———: **CONSTRUCTION OF INSTRUMENTS TRANSFERRING TITLE TO PERSONAL PROPERTY.** An instrument in the form of a mortgage or bill of sale will not be held to be an assignment for the benefit of creditors unless it creates trust in favor of some person or persons other than the mortgagor or vendor.
3. ———: ———: **RULE APPLIED.** H., a merchant in failing circumstances, with intent to prefer certain creditors, executed to C. a bill of sale of his entire stock of goods, the latter paying the preferred claims in full out of the consideration named in the bill of sale. In an action of replevin by C. against the sheriff, who had seized the goods on an order of attachment in favor of an unsecured creditor, *held*, that inasmuch as C. is the only person beneficially interested in the transfer, it cannot be held to be an assignment for the benefit of creditors, and that it is immaterial whether the bill of sale was intended as an absolute sale or as a mortgage only.
4. **Evidence examined, and held** sufficient to sustain the verdict and judgment of the trial court.

36	45
41	70
36	45
44	871
36	45
45	140
36	45
50	419
51	246
52	368

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ERROR from the district court of Hall county. Tried below before HARRISON, J.

Abbott & Caldwell, for plaintiff in error.

Thompson Bros., contra.

Post, J.

This was an action of replevin in the district court of Hall county, the pleading being in the usual form. Trial and judgment for the plaintiff below, whereupon the case was removed to this court upon petition in error. The material facts are as follows: For about a year previous to the 18th day of January, 1890, John W. A. Hoppel had been engaged in business as a general merchant in the town of Wood River. On the day above named he was, it is admitted, in failing circumstances, his assets, aside from a homestead of small value, consisting of a stock of merchandise worth, according to the estimate of witness, from \$1,400 to \$2,000, with liabilities amounting to \$2,864. Among his creditors were certain parties residing at Wood River, mostly for money advanced, to-wit: J. Bowen, \$600; F. M. Penney, \$100; The First National Bank of Wood River, \$300. Of the last named amount, \$100 was on his unsecured note and \$200 secured by the note of Mr. Bowen. The morning of the day named Bowen, after making an ineffectual effort to have Hoppel pay or secure the \$600 due him, called upon the defendant in error, who was cashier of the bank above named, and of which he, Bowen, was a stockholder, and made some inquiry about the standing and credit of Hoppel. The question of the value and cost of the goods was also discussed. Hoppel followed Bowen to the bank, where he executed to Chamberlain an instrument in the form of a bill of sale, by which he conveyed to the latter his entire stock of goods for the expressed consideration of \$1,600. Chamberlain, at the

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time, paid the full amount of the consideration named in the bill of sale, as follows: Cash to Bowen, \$600, being the amount due from Hoppel; by paying and satisfying in full the notes of Hoppel above named, \$400, and the balance, \$600 in cash, to Hoppel. Upon the execution of the bill of sale, Chamberlain took possession of the goods in controversy, which were seized by the plaintiff in error as sheriff two days later to satisfy an order of attachment against Hoppel in favor of Allen Brothers.

A question to which prominence was given at the trial below, and also in this court, is whether the transaction is to be treated as a sale of the stock of goods by Hoppel, or whether the so-called bill of sale was intended merely as a security for the \$1,600 advanced by Chamberlain. It is claimed by the latter that he purchased the goods for the consideration named, while the testimony of the former is relied upon to prove that the transaction is but a mortgage. This contention is supported by the fact that Hoppel, on the delivery of the bill of sale, executed to Chamberlain a note for \$1,600. The latter, however, explains the execution of the note last mentioned thus: In the purchase of the goods in question he was acting in the interest of the bank and the money paid was a part of its funds, and that he insisted upon the note in order to balance his books until the goods could be disposed of in order to avoid having them appear as a part of the resources of the bank. As the law applicable to this branch of the case plaintiff requested the following instruction: "You are also instructed that if you find from the evidence that the bill of sale was made to enable Chamberlain to dispose of the goods and out of the proceeds pay Hoppel's indebtedness to the bank, to Bowen and Peycke Bros., and that after such debts were paid any part of the goods or their value was to be returned to the said Hoppel, then such sale was void, and you should find for the defendant without regard to what the intentions of the parties or either of them might have been."

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It is claimed that this case is within the rule stated in *Bonns v. Carter*, 20 Neb., 566, and that in refusing to give the foregoing instruction the trial court erred. We have no occasion to consider the question of the effect of subsequent decisions upon that case as authority, since it is clear to us that it can have no application to the facts disclosed by the evidence in this. The mortgage in that case was held to be void on the ground that it created an express trust in favor of third parties named therein and was, in contemplation of law, an assignment for the benefit of certain preferred creditors. In this case there is no trust in favor of any third person. Chamberlain, the defendant in error, is the only beneficiary of the contract, whether construed as a mortgage or a sale. The claims of Bowen, Penney, and the bank were all satisfied in full out of the money advanced by him, and it is not claimed that he stood in the relation of trustee toward any other creditor. An assignment for the benefit of creditors implies a trust in favor of some person or persons other than the assignor. It was Hoppel's right to prefer the claims of these particular creditors, or of Chamberlain, who, to say the least, had succeeded to their rights. (*Davis v. Scott*, 22 Neb., 154; *Hershiser v. Higman*, 31 Id., 531; *Brown v. Williams*, 34 Id., 376; *Hamilton v. Isaac*, 34 Id., 709.) It is immaterial, therefore, whether the contract should be construed as a sale or as a mortgage, for in either event the defendant in error would be entitled to the possession of the property in controversy as against other creditors, provided the transaction was in good faith within the definition frequently given by this court. The trial court rightly refused the instruction in question.

2. The chief reliance of plaintiff in error is apparently upon the proposition that the transfer of the stock of goods to Chamberlain, by Hoppel, was in fraud of the other creditors of the latter. He claims broadly that the officers of the bank, including the defendant in error, being aware

of the purpose of Hoppel to defraud his creditors, knowingly assisted him to place his property beyond their reach, and that the transfer to him is therefore void. The facts relied upon to sustain the claim of fraud are as follows: Bowen, on the day in question, stated to Chamberlain, in substance, that Hoppel was in a bad fix and unable to pay the \$600 due him; that a collection in favor of Lindsay & Co., of Omaha, against Hoppel had been returned by the bank the day previous, and it then held for collection against him a draft by Peycke Bros. for \$5.50; that the value of the goods conveyed greatly exceeded the consideration paid. Chamberlain testified, when asked on cross-examination his reasons for buying the stock of goods, that his object was to protect the bank and Hoppel's home creditors. It is admitted that Hoppel's account with the bank was at the time overdrawn, but the amount of his overdraft does not appear. It is admitted that according to an invoice taken January 1, preceding, the value of the stock was \$2,400, cost price, but it was not claimed, at the time of the transfer to Chamberlain, that it exceeded \$2,000 in value. On the other hand defendant in error testifies that he had no knowledge that Hoppel was indebted for goods except to Lindsay & Co. and Peycke Bros. The amount of the draft returned to the former is not shown by the evidence, nor does it appear whether it was secured or not, or that it had ever been presented for acceptance or payment. It also appears that the draft of Peycke Bros. was paid by Hoppel at the time of the conveyance, and the claim of Lindsay & Co. was subsequently secured by mortgage on his homestead. Hoppel, who testifies with apparent candor and fairness, on cross-examination says:

Q. Can you tell the first thing you said to Chamberlain?

A. Well, I told him I was in bad circumstances, * * and wanted to fix matters up.

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Q. You told him you were in bad circumstances?

A. Yes, and that I owed Bowen \$600.

Q. Tell him that you owed any other parties?

A. I told him I owed—well he knew I owed the bank—that is all.

Q. Tell him about anybody else?

A. No, sir.

Q. Didn't tell him a word about them; he didn't ask you how much you owed or to whom?

A. No, sir.

Q. Did he go on and make out a bill of sale without anything further being said?

A. No, sir; he asked me how—what the trouble was of course.

Q. What did you tell him?

A. I told him I had been sick * * and that I owed Mr. Bowen and that he wanted his money and I wanted to get some money.

Q. Did you ask him to loan you the money? Did you ask him the best way to fix it up?

A. I don't know as I did.

Q. Who made the first proposition about buying the stock of goods?

A. Just then I gave him a bill of sale of the goods.

Q. Who made the first proposition about buying the goods, you or he?

A. I suppose I did.

Q. What was the first terms you offered? What was your first proposition in regard to the sale of the stock?

A. I told him I owed Mr. Bowen \$600, and he had some against me, and I was so I did not know whether I could work or not, and the stock would be worth \$1,600.

The value of the stock, according to the witness for the defendant in error, was from \$1,400 to \$1,600. At the time of the transfer, it will be remembered, Hoppel was indebted to the bank \$400, including the Penney note, which

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it held by assignment, of which amount \$200 was unsecured, and the reasonable inference is that the object of Chamberlain was to protect it as well as Bowen, who was a customer and stockholder. It is not, however, seriously claimed that the contract is void for that reason alone. The question of fraud or good faith is one of fact, and was fairly submitted to the jury upon instructions, which it is admitted correctly state the law. With the verdict upon the evidence we are not at liberty to interfere. That a judgment or order will not be reversed for the reason that it is not in accordance with the preponderance of evidence, is a rule so often announced by this court as to render the citation of the cases wholly superfluous. The district court did not err in overruling the motion of plaintiff in error for a new trial, and the judgment is

AFFIRMED.

THE other judges concur.

ANDREW F. BLOOMER, APPELLEE, v. LUCIAN C. NOLAN
ET AL., APPELLANTS.

FILED JANUARY 3, 1893. No. 4455.

1. **Contract of Infant: DISAFFIRMANCE: CONDITIONS OF GRANTING RELIEF.** One who seeks to disaffirm a contract on the ground that he was an infant at the time of its execution is required to return so much of the consideration received by him as remains in his possession at the time of such election, but is not required to return an equivalent for such part thereof as may have been disposed of by him during his minority.
2. — : **MECHANICS' LIEN ON PROPERTY OF INFANT.** The property of an infant is not subject to a mechanic's lien for material purchased by him during his infancy, nor will he be held to have ratified the contract so as to entitle the material-man to a

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lien thereon by retaining the property after he attains his majority.

3. — : — : DECREE : SUFFICIENCY OF EVIDENCE. Evidence examined, and held not sufficient to sustain the decree of the district court allowing a mechanic's lien in favor of the plaintiff.

APPEAL from the district court of York county. Heard below before SMITH, J.

Sedgwick & Power, for appellants.

George B. France, contra.

POST, J.

This was an action in the district court of York county to foreclose a mechanic's lien. Decree was entered in favor of the plaintiff in accordance with the prayer of his petition, from which the defendants have appealed. In his petition the plaintiff alleges that on or about the 18th day of August, 1886, he entered into a verbal contract with the defendants, by virtue of which he was to furnish them building material for the erection of a dwelling house upon premises owned by them, to-wit, a quarter section of land in said county, and that in pursuance of said contract he furnished to defendants, between the date last named and the 17th day of September, 1886, building material to the amount and of the value of \$224.98. It also appears from the petition that an itemized statement of the account, duly verified, was filed with the county clerk within four months from the time of furnishing of said material. The defendants filed separate answers, that of Mosher being a general denial, while Nolan, in addition to a general denial, alleges that at and during all the times mentioned in the petition he was a minor under twenty-one years of age. The reply to the answer of Nolan is a general denial. The ground of the judgment against the last named defendant is not clear from the record. It is

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true that he purchased the material, as alleged by the plaintiff, but it is clear from the undisputed evidence that he was at the time a minor, but nineteen years of age. There is no foundation for the contention that he has ratified the contract since attaining his majority, first, because that question is not put in issue by the pleadings, and second, because there is no sufficient evidence to support such a contention. There is no evidence whatever of an express ratification, neither will a ratification be inferred from the retention of the property by him. The rule is well settled that one who seeks to avoid a contract on the ground of infancy will be required to make restitution of so much of the consideration only as is retained by him when he attains his majority, or when he elects to disaffirm. (*Green v. Green*, 69 N. Y., 553; *Jenkins v. Jenkins*, 12 Ia., 195; *Burgett v. Barrick*, 25 Kan, 527; *Bartlett v. Drake*, 100 Mass., 174; *Reynolds v. MoCurry*, 100 Ill., 356; *Craig v. Van Bebber*, 100 Mo., 584; *Price v. Furman*, 27 Vt., 268; Tyler, *Infancy* [2d ed.], 37.) The law which is designed to protect the young and inexperienced would be ineffectual for that purpose if an infant was required, as a condition to relief, to return an equivalent for property wasted or squandered. It is clear also from the evidence in the record that Nolan had no interest in the property at the time he attained his majority and was incapable of making restitution. But the rule which requires restitution has no application to cases like the one under consideration. "There can be no mechanic's lien upon the land of a minor, for he can make no contract which is binding upon himself or property. The lien is incident only to a legal liability to pay a debt. It is immaterial that the minor represented himself to be of age. Even if there be a contract for erecting buildings upon a minor's property with his guardian, no lien is conferred, if the guardian had no authority in law to make the contract. Of course a minor may ratify a contract made

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during his minority out of which liens might arise. But such ratification cannot be implied from his retaining his property and collecting rents from it. The ratification must be an intentional acknowledgment of the obligation of the contract." (Jones, Liens, sec. 1239). The infancy of Nolan is a complete defense and the judgment against him cannot be sustained.

It remains to be determined whether the judgment against Mosher and the decree of foreclosure against the premises described is sustained by the evidence. From the testimony of the plaintiff it appears that the contract under which he furnished the lumber was made with Nolan on the 30th day of July, 1886, and a considerable part thereof furnished prior to August 28 following. On the last named day Mosher, who then owned the land, conveyed it by deed to Nolan who, on the same day, mortgaged it to the New Hampshire Banking Company for \$1,200, and immediately reconveyed to Mosher, in whom the record title has remained. In plaintiff's direct examination he does not mention Mosher's name in connection with the contract, except to state that he was informed by Nolan that the lumber was to build a house on the Ed. Mosher place. On cross-examination he is asked:

Q. You had nothing to do with Mr. Mosher about this contract, did you?

A. I made no contract with him personally; no, sir.

Q. Did Mr. Mosher ever have any talk with you in regard to furnishing the lumber bill?

A. No, sir.

Q. Did you charge the lumber to Mr. Mosher?

A. It isn't charged to Mr. Mosher.

Q. Did you charge it to Mosher on your books?

A. No, sir.

It is also apparent from his cross-examination that the first written charge against Mosher was at the time of the filing of the lien.

Mosher testifies in his own behalf that he did not authorize the purchase of the lumber by Nolan, and had no knowledge of its having been used on the premises until after the completion of the building. It appears that his home was in the city of York, and according to his testimony he did not visit the premises between the time the lumber was procured by Nolan and the following spring. The execution of the two deeds and the mortgage on August 28 is explained by him thus: He had agreed to trade the quarter section in question to Nolan for an eighty-acre tract owned by the latter, and an additional consideration which does not clearly appear from the record. The conveyance was made to enable Nolan to raise the money by mortgaging to the New Hampshire Banking Company, for which Mosher was agent. The money received as the proceeds of the mortgage was paid to Mosher, who executed a bond for a deed in favor of Nolan, who had already gone into possession, and who continued in possession of the premises until October 17, 1888, on which day he executed a deed therefor to Mosher. The last named deed purports to convey the property, subject to the mortgage in favor of the New Hampshire Banking Company, and contains the following recital: "All mechanics' liens appearing of record against said premises are invalid and illegal." According to the testimony of Mosher it was executed in consequence of the fact having come to his knowledge that Nolan was a minor at the time of the execution of the first conveyance by him. To entitle a material-man to recover under the provisions of section 1 of the mechanics' lien law, it is just as essential for him to prove a contract or agreement, express or implied, with the owner or his agent as it is to prove the furnishing of the material claimed for or the filing of the verified account thereof with the register of deeds. (Jones, Liens, 1235, 1236.) It is suggested that the decree for plaintiff may be sustained on the ground that Nolan was acting as the agent of Mosher in the

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purchase of the lumber. That contention, however, has no foundation in the record, for the evidence clearly proves that Mosher not only did not authorize the purchase of the lumber, but was ignorant of the building of the house until long after its completion. We are satisfied, after a careful examination of the record, that the plaintiff is not entitled to a lien, and the decree of the district court should be reversed and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

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MARY MAJORS V. NICHOLAS N. EDWARDS ET AL.

FILED JANUARY 4, 1893. No. 4749.

1. **SUMMONS: AFFIDAVIT FOR SERVICE BY PUBLICATION: SERVICE.** An affidavit for service by publication was in the following form: "Isaac Edwards, being duly sworn, deposeth and saith that he is the attorney for said plaintiff; that said John Edwards is not in the state of Nebraska, and that said Mary Majors is a non-resident of said state of Nebraska, and is now absent from said state; that service of a summons cannot be made within the state of Nebraska on the said defendant to be served by publication, and that the case is one of those mentioned in the seventy-seventh section of the Code of Civil Procedure, and further saith not." *Held*, That as the object of the action was specified in sec. 77 of the Code, that there was not an entire omission to state the material facts showing a right to make service by publication and therefore it was not void, and that a decree of foreclosure rendered upon constructive service based on such affidavit would be sustained.
2. ———: ———. A mistake in the title of an affidavit is immaterial after judgment.

ERROR from the district court of Douglas county. Tried below before WAKELEY, J.

John W. Lytle, for plaintiff in error.

Breckenridge, Breckenridge & Crofoot, and *Kennedy, Gilbert & Anderson*, *contra*.

MAXWELL, CH. J.

This is an action to redeem lots 9, 10, 11, 12, 13, 14, 15, and 16, in block 27, in Wilcox's 2d addition to the city of Omaha. The court below found the issues in favor of the defendant and dismissed the action. It appears from the record that in the year 1878 one John Edwards brought an action in the district court to foreclose a mortgage on said lots; that the sole defendant was the plaintiff in this action; that she was a non-resident of the state and service was had upon her by publication; that a decree of foreclosure was duly rendered and the property sold to one Nicholas N. Edwards, who has conveyed to various parties. The sole ground upon which the right to redeem is claimed is that the affidavit for publication is insufficient to give the court jurisdiction. The affidavit is as follows:

"In the District Court in and for the County of *Messar* and State of Nebraska.

"JOHN EDWARDS }
v. }
MARY MAJORS. }

"STATE OF NEBRASKA, } ss.
COUNTY OF DOUGLAS. }

"Isaac Edwards, being duly sworn, deposeth and saith that he is the attorney for said plaintiff; that said John Edwards is not in the state of Nebraska, and that said Mary Majors is a non-resident of said state of Nebraska, and is now absent from said state; that service of a summons cannot be made within the state of Nebraska on the said defendant to be served by publication, and that the case is one of those mentioned in the seventy-seventh

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section of the Code of Civil Procedure, and further saith not.

ISAAC EDWARDS.

"Subscribed in my presence and sworn to before me this 14th day of October, 1878.

WM. H. JAMS,

"Clerk."

The objections to said affidavit are set forth in the petition as follows: "That said affidavit does not set forth the nature of the action, nor a description of the property in controversy, nor that said property is in Douglas county, nor that it is an action in which the statute permits the service by publication, nor the court in which the action is pending; and that the notice of publication is not sufficient in law, in not being proved by an affidavit of the printer of the newspaper in which it was published, nor his foreman or principal clerk, by reason whereof the court had no jurisdiction to render said decree."

Sec. 77 of the Code is as follows: "Service may be made by publication in either of the following cases: *First*—In actions brought under the 51st, 52d, and 53d sections of this code, where any or all of the defendants reside out of the state. *Second*—In actions brought to establish or set aside a will, where any or all of the defendants reside out of the state. *Third*—In actions brought against a non-resident of this state, or a foreign corporation, having in this state property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way. *Fourth*—In actions which relate to, or the subject of which is, real or personal property in this state where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the state or a foreign corporation. *Fifth*—In all actions where the defendant being a resident of the state has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of

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a summons, or keeps himself concealed therein with like intent."

The principal case relied on by the plaintiff to secure a reversal is *Atkins v. Atkins*, 9 Neb., 191. That was an action for a divorce, and the affidavit was as follows:

"STATE OF NEBRASKA; }
LANCASTER COUNTY. } ss.

"Henry Atkins, being first duly sworn, on oath says: That he is the plaintiff in the above entitled action; that service of summons cannot be made within this state on the defendant, Rebecca Atkins, on whom service by publication is desired, and that this cause is one mentioned in section No. 77, of title V of the Revised Statutes of Nebraska as amended.
HENRY ATKINS."

It will be observed that section 77 does not apply to divorce proceedings, there being a special provision in the statute relating to divorce and alimony, which regulates the service when made by publication. The difficulty in the *Atkins* case was that there was no positive statement of the plaintiff under oath as to the nature of the cause of action, to show that the court had authority in the premises to grant a decree. Had these facts appeared in the affidavit it would not have been void, even if informally or defectively stated, provided there was not an entire omission of some material fact. In the case at bar, however, there is not an entire omission to state the nature of the cause of action. It is stated informally, it is true, and it would be much better to state directly, that the object of the action was to foreclose a mortgage upon real estate, but sufficient is shown to entitle the plaintiff to make service by publication. The mistake in the title of the affidavit is immaterial after a decree is rendered. The judgment is therefore right and is

AFFIRMED.

THE other judges concur.

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STATE OF NEBRASKA, EX REL. STATE JOURNAL CO., V.
JAMES E. BOYD, GOVERNOR, ET AL.

FILED JANUARY 4, 1893. No. 5822.

1. **Contingent Fund Appropriated for Governor's Office:**
DISCRETION OF GOVERNOR: **MANDAMUS.** The governor is vested with a discretion in the use of the contingent fund appropriated by the legislature. He may in his discretion use said fund for the purchase of stationery needed by the state, but will not be required by *mandamus* to approve a warrant drawn against it on account of books and stationery ordered by him.
2. ———: **OFFICE SUPPLIES.** In the fund for books, blanks, and printing in the governor's office there still remains unexpended the sum of \$152. *Held,* That this sum should be applied to the payment of blanks furnished for said office.

ORIGINAL application for *mandamus*.

Marquett, Dewees & Hall, and *A. G. Greenlee,* for relator.

George H. Hastings, Attorney General, *contra.*

PER CURIAM.

The relator states in its application for a *mandamus* that "it is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska; that James E. Boyd is governor, and Thos. H. Benton auditor of the state of Nebraska; that on the 9th, 16th, 20th, 22d, 26th, and 31st days of January, and on the 9th, 16th, and 20th days of February, and the 6th and 31st days of March, of the year 1891, the relator herein sold and delivered to James E. Boyd, governor of the state of Nebraska, the following goods, wares, and merchandise as shown by a bill of the same, which is hereto attached, marked 'Exhibit A,' and made a part of this application.

State, ex rel. State Journal Co., v. Boyd.

"Relator alleges the fact to be that the said James E. Boyd, governor, purchased said goods for and on behalf of the state of Nebraska, to be used by the governor of said state in his office as governor, and that the said bill has never been paid, nor any part thereof, although the same is long past due.

"Relator further alleges the fact to be that the said James E. Boyd, governor, has failed, neglected, and refused to approve said bill, or to approve a voucher drawn for the same, and that the said Thos. H. Benton, as auditor of the state of Nebraska, has refused to draw a warrant for the payment of said bill, assigning as the reason therefor that the goods, having been purchased by the governor for his department, it was his duty to approve or O. K. the said bill as being correct, and that the said auditor has refused to draw a warrant for the same because the said James E. Boyd, governor, has refused to approve the said bill as correct, due and owing to the relator.

"Relator further alleges the fact to be that the prices charged in said bill for said goods were the reasonable value of the same, and that the relator, herein is entitled to the payment from the respondents herein of the sum of \$386.60, together with interest thereon as provided by law, and that the respondents, and each of them, have refused to pay the said claim, or to draw a warrant for the same, and that the relator herein is remediless in the premises except by the interposition of this court of the writ of *mandamus*.

"Relator further represents to the court that the legislature of the state of Nebraska appropriated for the year ending March 31, 1892, and March 31, 1893, for the office of the governor of the state of Nebraska, for the purpose of paying for such books, blanks, and printing as might be used in said office, the sum of \$600, and for the purpose of buying stationery, the sum of \$500, and a contingent of the sum of \$2,000, and for postage the sum of

State, ex rel. State Journal Co., v. Boyd.

\$400, and that there is at this time a sufficient sum of money in the funds so designated and placed at the disposal of the said governor of the state of Nebraska against which warrants may be drawn for the payment of the relator's claim.

"The relator further alleges the fact to be that the said James E. Boyd, as governor, had not incurred indebtedness beyond the amount appropriated by the legislature for his department at the time the indebtedness herein sought to be collected was incurred.

"Wherefore the relator prays for a writ of *mandamus*, directed to James E. Boyd, governor of the state of Nebraska, commanding him to approve said bill as correct, and that upon the approval of the same by him, that the said Thos. H. Benton, auditor of the state of Nebraska, be directed to draw a warrant in favor of the relator herein for the amount of said bill, to-wit, the sum of \$386.60, together with interest thereon at the rate of seven per cent per annum from the 1st of October, 1892."

To this the governor files an answer as follows:

"Comes now James E. Boyd, governor of the state of Nebraska, one of the respondents in the foregoing action, and for answer to said application for a writ of *mandamus*, herein filed by said relator, says:

"He admits that he is governor of the state of Nebraska, duly elected, qualified, and acting as such, and was such governor during all the time mentioned and described in said plaintiff's application, that is to say, from January 9th, 1891 to March 31st, 1891, and so continued to discharge the duties of governor of the state of Nebraska, until May 5th, 1891, when he was relieved of his said office by an order and judgment of this honorable court, which judgment continued in force until the same was reversed, on the 5th day of February, 1892. Since which time, until the present, he has continued to exercise all the functions and discharge all the duties pertaining to said

State, ex rel. Sta'e Journal Co., v. Boyd.

office. That the legislature of the state of Nebraska, by an act duly passed and approved on the 6th day of April, 1891, made an appropriation for the office of the governor of the state of Nebraska, for the payment of the current expenses of said office for the year ending March 31st, 1892, and March 31st, 1893, as follows:

Postage	\$400
Books, blanks, and printing.....	600
Stationery	500
Telegraph, telephone, and express	400
Contingent fund	2,000
Furniture and repairs	200
House rent for governor	2,000
Stenographer.....	300
Book-keeper and recorder	225
Messenger	225
Salary of governor.....	5,000
Salary of private secretary	4,000
Stenographer	2,400
Clerk.....	2,000
Messenger and assistant clerk.....	2,000

"That the above and foregoing are all the items that were appropriated by said legislature for said office of governor, and all the funds of every description under the control of this respondent as such governor.

"This respondent further says that the several items of merchandise mentioned and described in relator's application for a writ of *mandamus* consist of stationery, and stationery alone, and if properly chargeable at all, were all chargeable to the item of stationery mentioned in said appropriation of \$500 for stationery, but this respondent alleges that said appropriation for said purpose has been exhausted in the payment of bills of stationery bought by this respondent and the occupant of the said office of governor during the time that he was not discharging the duties thereof, between May 5, 1891, and February 5, 1892, as

State, ex rel. State Journal Co., v. Boyd.

aforesaid, except the sum of \$52.52, which is the entire amount still remaining on hand of the stationery fund, the sum of \$447.48 having already been drawn as aforesaid. That of the item of \$600, so as aforesaid appropriated for books, blanks, and printing, the sum of \$135.33 remains, but no more. This respondent alleges that said bill of said relators is not properly chargeable to said fund, as the same is not books, blanks, and printing, or either of said articles.

"That of the item of \$2,000, so as aforesaid appropriated by said legislature to said office for a contingent fund, there has been drawn by this respondent, and by John M. Thayer, while he was discharging the duties of the office of governor of Nebraska, between the 5th day of May, 1891, and the 5th day of February, 1892, the sum of \$1,725.35, and there yet remains of said contingent fund on hand and subject to be drawn by this respondent the sum of \$274.65, and no more. That section 22, article 3, of the constitution of the state of Nebraska, among other things, provides that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon, and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution.

"This respondent submits to this honorable court that the only fund at his command with which he could pay said bill of said relator is the stationery fund, of which there still remains in his hands unexpended the sum of \$52.52, as aforesaid; that he is now, and at all times has been, ready and willing to draw, sign, and approve a voucher for said sum, but no more, for the reason that said sum is all the funds at the command of this respondent, available for the payment of the bill of relator, and as great a sum as this respondent can by law approve, draw,

or sign a voucher for, by reason of such appropriation for stationery being exhausted, but said relator refuses to accept the same, and this respondent further submits that under the constitution and the law of the state he cannot pay said bill, or any part thereof, from either said contingent fund or from the appropriation so as aforesaid made for books, blanks, and printing, nor can he lawfully pay the same from any other fund or appropriation made by said legislature.

"Wherefore, this respondent prays judgment of the court that said action may be dismissed, that he may go hence without day, and recover his costs herein expended."

By stipulation "It is admitted that the appropriation made by the legislature of the said state for the office of governor, as set up in the application of relator, is as follows:

Books, blanks, and printing.....	\$600
Stationery	500
Contingent fund	2,500

"That the balance unexpended of the funds so appropriated for books, blanks, and printing is \$145.33; that the sum unexpended of the amount so appropriated for stationery is \$52.52; that the amount unexpended of the funds appropriated for contingent fund is \$274.65.

"It is agreed that the bill as itemized and attached to the application is a correct statement of the goods for the use of the governor's office, and that the prices named therein are the usual and reasonable prices for all said goods, and that the said goods were of the character and kind described therein.

"The said defendant, James E. Boyd, as governor of the said state, has refused to allow the said bill, or to issue a voucher therefor, except against the fund so appropriated for stationery, and that if this honorable court shall be of the opinion that any of said items can be legally paid out of the other funds above named, the amount of such items

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may be required to be paid out of such other funds up to the amount unexpended, as above stipulated.

"It is agreed that if the court desires to inspect any of the goods enumerated in said item, in order to ascertain to which of the above named classes they belong, either party may introduce goods of like character in evidence."

It is conceded that blanks of various kinds of the value of more than \$200 were furnished by the relator for the governor's office for which payment has not been made. It also appears that \$152 still remain in the fund for books, blanks, and printing, and in our view this sum may be applied to the payment of the relator's claim. A portion of the relator's claim is for stationery for a sum in excess of \$52. This claim the defendant offers to approve, and no doubt is ready to do so, for blanks to the extent named. No writ will therefore be issued unless further application is made.

As to the contingent fund the writ must be denied, unless the governor can be required to apply this particular fund to the purpose of paying for the stationery in question. We are clear that he cannot be required to do so, since it is apparent that he is by law vested with a discretion in the use of that fund, and the writ of *mandamus* will not be used to control an officer in the exercise of his discretion. This is elementary.

JUDGMENT ACCORDINGLY.

MARC A. UPTON ET AL. V. THOMAS C. KENNEDY.

FILED JANUARY 4, 1893. No. 4859.

1. **Sham Pleadings: GENERAL DENIAL.** Where the answer to a petition is a general denial and it appears from the pleadings themselves that it is false it may be stricken from the files as sham.

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2. ———: ———: AFFIDAVITS. Where a general denial is sufficient in form and there is nothing on the face of pleadings to show that it is false the court will not enter into an examination of the merits of the defense upon affidavits.

ERROR from the district court of Douglas county. Tried below before WAKELEY, J.

De France & Richardson, for plaintiffs in error.

Wharton & Baird, contra.

MAXWELL, CH. J.

On the 17th day of April, 1889, the defendant, M. A. Upton, executed a promissory note for \$800 to Chittenden, and to secure the payment of the same Upton and wife executed a mortgage upon lot 20, block 3, in Brown Park addition to South Omaha; also on said date he executed a second note to Chittenden for \$800, and to secure the payment of the same he and his wife executed a mortgage upon lots 13 and 14, in block 6, in said addition. On the same date as the first and second notes Upton executed a third note to Chittenden for \$800, and to secure the payment of the same he and his wife executed a mortgage to Chittenden on lot 22, in block 3, in the aforesaid addition. Chittenden assigned the mortgages to the plaintiff, and default having been made, an action was brought to foreclose the same. To the petition so filed the defendants, Upton and wife, filed an answer, as follows: "Come now M. A. Upton and Mary A. Upton, defendants, and for their separate answer to the petition of the plaintiff herein they deny each and every allegation in said petition contained." This was duly verified. The plaintiff thereupon filed a motion as follows: "Now comes the plaintiff and moves the court to strike the answer of M. A. Upton and Mary A. Upton from the files of this court, because the same is sham and frivolous, and bases

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this motion on the affidavits herewith filed and the original mortgage selected (executed) by the defendants, Marc A. Upton and Mary A. Upton, together with his notes secured thereby." This motion is supported by these affidavits, in substance, that each of the affiants had had a conversation with Marc A. Upton, and that he had admitted that the notes were genuine, and impliedly that he would pay the same as soon as he could. On the hearing of the motion the judge interrogated the attorneys in the case if they intended to dispute the genuineness of the notes, and they informed the judge that they did not, but insisted that they were entitled to make any defense available under a general denial. The court, however, sustained the motion and struck the answer from the files, as sham, and the plaintiff took a decree of foreclosure and sale by default. The sole question is the ruling of the court on the motion.

A sham pleading is defined as one which is good in form but false in fact. (Bliss, Code Pl., sec. 422; Maxw., Code Pl., 553.) The codes of Colorado, Indiana, Iowa, Kentucky, New York, North Carolina, South Carolina, and Wisconsin contain provisions for striking out sham answers or defenses. The subject is not named in the other code states, but as the power existed at common law it is no doubt retained under the code. An examination of the cases will show a direct conflict in the decisions as to what answers will be stricken out as sham. The better rule seems to be to treat all answers which are false on their face as shams. Thus, suppose the maker of a note or other instrument sued ~~or~~ should, in the verification of his answer, swear that he had no knowledge, information, or belief as to the genuineness of the instrument and, therefore, denied the same. In such case the answer would be false on its face, because the alleged maker must have known whether the instrument was true or false. So if it appears that he had knowledge from public records, it is his duty to ex-

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amine the same and frame his answer accordingly. But unless these facts appear on the face of the record the court will not enter into an investigation of the facts upon affidavits to determine the *bona fides* of the defense. And particularly is this true where the answer, as in this case, is verified. (*Wayland v. Tysen*, 45 N. Y., 281; Pom. Rem., sec. 685; Maxw., Code Pl., 554.) Affidavits are a very imperfect mode of presenting testimony to a court. There being no cross-examination, if skillfully drawn, they may cover up or distort the truth so as to present the facts in a false light. In *Scotfield v. State National Bank*, 9 Neb., 316, this court held that where the answer raises issues of fact apparently in good faith, the court would not strike it from the files as being untrue. The rule established in that case is the true one, we think, and will be adhered to. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ELIZABETH M. DAVIS, APPELLANT, v. MAURICE SULLIVAN, APPELLEE.

FILED JANUARY 4, 1893. No. 4776.

Injunction: SURFACE WATER: SUFFICIENCY OF EVIDENCE. The plaintiff owned a lot in the city of Omaha, which she purchased in the spring of 1873 and took possession of the same in the fall of that year. The lot was inclosed. The defendant purchased the lot adjoining the plaintiff's lot on the south in 1872 and took possession thereof, and the division fence between the two lots was recognized as the true line for seventeen years. In an action to enjoin the defendant from permitting surface water to flow on the plaintiff's lot, *held*, that there was a failure of proof to entitle the plaintiff to recover and there was no equity in the petition.

APPEAL from the district court of Douglas county.
Heard below before TIFFANY, J.

Holmes & Macomber, for appellant.

Cowin & McHugh, contra.

MAXWELL, CH. J.

This is an action to restrain the defendant from permitting surface water to flow from his lot upon the premises of the plaintiff and prevent him from interfering with any barriers she may erect and maintain to prevent the flow of such water, and for general relief. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action. The plaintiff appeals.

The plaintiff in this case is the owner of the east half of lot 9, in block 4, in Kountze & Ruth's addition to the city of Omaha. The defendant is the owner of lot 10, in said block, adjoining and south of said lot 9. The land in this block slopes downward from south to north at a somewhat abrupt grade, and it also slopes somewhat from the west toward the east. The lots in said block extend east and west from Eighteenth street to Nineteenth street. Just east of the center of the lots, and hence about the middle of the block, a ditch or gully has long existed, extending from south to north through the entire block. The ground in the block inclined from Eighteenth street westward to this ditch or gully and from Nineteenth street eastward to the same. Thus the surface water of said block found its natural and accustomed outlet through this ditch or gully running northward therein through the block to St. Mary's avenue. The defendant purchased lot 10 in 1872, and at once entered into possession thereof. The plaintiff purchased lot 9 in the spring of 1873, going into possession thereof in the fall of that year. At the time Mr. Sullivan purchased his lot there was a fence along its north side on

the line between his lot and the lot in question. This fence was standing when Mrs. Davis purchased her lot. It remained standing, being at times repaired on the same line, until 1886. About a year after the plaintiff had purchased and occupied lot 9, a fence was built along the north side of her lot, separating it from lot 8. Plaintiff's lot has thus been inclosed by fence on the north and south since 1874. Plaintiff's lot has, according to the plat and her deed, a frontage and width of fifty feet, and from 1874, when her north fence was built, she has had her full width and frontage of fifty feet inclosed, and enjoyed the possession thereof. In 1886 the plaintiff sold the west half of her lot and erected a block of three tenement houses upon the east half of her said lot. In grading and excavating for these tenements she caused the earth therefrom to be placed immediately in the rear of said buildings, which thereby raised the surface of the ground in the rear of said buildings several feet and obstructed the flow of the surface water. This seems to have caused the surface water which flowed from the southern part of the block to run on the plaintiff's lot and at times into her tenement houses. To prevent this the plaintiff undertook to construct a drain south of said tenements to carry off this surface water eastward to Eighteenth street. The defendant claims that this drain was being constructed across the line on his lot, to which he in vigorous terms seems to have objected. The plaintiff thereupon brought this action. The court below, hearing all the evidence, found the issues in favor of the defendant and dismissed the action. Mrs. Davis testifies as follows:

Q. Was there a fence on the south of that house?

A. Yes, sir.

Q. State to the court whether that fence was there when you moved on the property.

A. Yes, sir; dividing us from Mr. Sullivan's lot.

Q. Mr. Sullivan owned the lot south of it?

A. Yes, sir.

Q. State whether or not that fence remained all the time you were living on the lot.

A. Yes; the fence remained there until we commenced to build the brick building.

Q. Until you commenced to build the brick building?

A. Yes, sir; Mr. Sullivan had a sewer through the lot and caused the earth to fall about the time we were building.

Q. That was for his house?

A. Yes, sir.

Q. Did the yard inclosing your house extend over to that fence?

A. Yes, sir.

Q. Then were you in possession of it all the time from 1873 until beginning the building?

A. Yes, sir.

Q. Do you know while you were there where the fence was on the north side of the lot?

A. Just about fifty feet from the south fence.

Q. When was that fence on the north side of your lot built? Was it there when you went there?

A. No, sir; that was built about a year afterwards, I think.

Q. Do you know the distance between those two fences?

A. Yes, sir.

Q. Can you state the distance?

A. That we occupied?

Q. Yes.

A. Fifty feet.

Q. The distance in between the fences?

A. Fifty feet; Mr. Davis measured two or three times.

The division line between the plaintiff's lot and that of the defendant seems to have been accurately marked out by the fence in question, and the parties have treated it as the true line for nearly twenty years. The testimony tends to

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show that it is the correct line, and that the defendant in defending his own possession was not in the wrong. There is also a failure to show that the defendant collects the surface water on his lot and causes or permits it to flow onto that of the plaintiff. There is no equity in the petition, and the judgment of the court below is

AFFIRMED.

THE other judges concur.

WALTON E. BURLINGIM V. J. M. COOPER ET AL.

FILED JANUARY 4, 1893. No. 4819.

1. **Action: WHEN COMMENCED.** An action is begun in this state by filing a petition in the district court upon which summons is issued which is served on the defendant.
2. **Mechanics' Liens: FORECLOSURE: SUMMONS: LIMITATION OF ACTIONS.** A mechanic's lien continues in force for two years after the date of filing the lien, and in case an action is brought to foreclose the same, until judgment is recovered and satisfied. If a summons is issued before the expiration of the two years from the filing of the lien, it may be served afterwards within the statutory time, but if not issued until after the expiration of two years, an action to enforce the lien will be barred.
3. ———: ———: **NEW PROMISE PROOF.** *Held*, That the proof failed to show a new promise of the purchaser of the property to pay the debt.

ERROR from the district court of Douglas county. Tried below before WAKELEY, J.

Winfield S. Strawn, for plaintiff in error.

Fawcett, Churchill & Sturdevant, and *James W. Carr*,
contra.

36	73
42	271
36	73
47	87
36	73
54	17
55	604

MAXWELL, CH. J.

The plaintiff is a lumber dealer in building material, and sold sufficient of said material to Peterson for the erection of a cottage on the middle one-third of lot 1, block 13, of the Improvement Association addition to Omaha. The title to the lot at the time of the contract was in S. E. Rogers, but Peterson's wife had purchased the same. Cooper was the contractor who erected the building and seems to have been anxious to befriend Peterson. Selden purchased the premises from Peterson after the erection of the cottage. The testimony shows that the last item on the plaintiff's account was furnished on the 29th of April, 1887, and that a mechanic's lien was filed on the 27th of June of that year. A petition to foreclose the lien was filed on the 26th of June, 1889, but no summons was issued until July 11, 1889. On the trial of the cause the court rendered judgment against Peterson for the sum of \$194, but held that the lien was barred before bringing the action and therefore dismissed the action as to the defendant Selden. The plaintiff contends that the action was commenced by filing the petition and that therefore the court erred. Section 19 of the Code provides, "An action shall be deemed commenced within the meaning of this title, as to the defendant, at the date of the summons which is served on him; where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication shall be regularly made." Section 3 of the mechanics' lien law provides that where the lien is obtained it shall remain in force for two years after the filing of such lien. Section 4 provides that where suit is commenced the lien shall continue until the suit is determined and satisfied. The suit, however, must be brought within two years from the filing of the lien, otherwise the lien will be barred. If the summons in this case had been issued within two years, it

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might have been served on the defendant after the expiration of that time, because the statute so provides. This question has been twice before this court in error cases, and it was held that a summons issued after the expiration of a year from the date of final judgment was too late. (*Baker v. Sloss*, 13 Neb., 230; *R. V. R. Co. v. Sayer*, 13 Id., 280.) The same rule applies in the case at bar. The action was not commenced within the meaning of the statute until summons was issued which was served on the defendant, and as this was not done within two years the bar of the statute as to the lien was complete.

But it is sought to hold Selden upon the ground that he promised to pay the debt. The promise is alleged to be contained in the following letter:

“OMAHA, NEB., April 5th, 1889.

“*W. E. Burlingim, Esq., Omaha, Neb.*—DEAR SIR: Your letter of March 22d was received in due time. I have delayed answering in hopes I would be able to pay you some money, but find that I am unable to do so at present. I have about \$2,500 in brick which I am trying to sell. It was with expectations of selling that I hoped to get money for you. I think I will be able to sell within a short time and then I will let you have some money, but do not see any way to raise it in any other way.

“Hoping that you will be patient with me for a short time I remain,

“Yours truly,

D. J. SELDEN.”

The letter to Selden, to which this is an answer, was not produced, nor could its contents be shown, so that it is not certain that the promise applies to this claim. If Selden purchased the premises, and as part of the consideration agreed to pay the debt, no doubt he would be liable therefor, but such facts are not established by the proof. The judgment is right and is

AFFIRMED.

THE other judges concur.

JOHN P. SHONING V. WILLIAM COBURN, SHERIFF.

FILED JANUARY 17, 1893. No. 4830.

1. **Action on Replevin Bond: PLEADING.** *Held*, That the petition states a cause of action, and that the new matter in the answer was not material.
2. **Waiver of Jury Trial: OBJECTIONS: REVIEW.** Where objection is made that the record fails to show that a jury was waived and the cause tried to the court, it must appear that the objection was made and overruled in the trial court. It is unavailing if made for the first time in the supreme court.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

Saunders & Macfarland, for plaintiff in error.

John T. Cathers, *contra*.

MAXWELL, CH. J.

This action was brought upon an undertaking by the defendant in error against the plaintiff in error to recover thereon, and on a trial of the cause the court rendered judgment in favor of defendant in error for the amount claimed. There is no bill of exceptions and the cause is submitted on the pleadings. It is claimed on behalf of the plaintiff in error that the petition fails to state a cause of action. First, because the plaintiff's interest does not appear affirmatively, and second, because it does not appear that a return of the property cannot be had. The petition is as follows:

"The plaintiff complains of the defendant for that on the — day of August, A. D. 1888, Charles W. Mount commenced an action of replevin in Justice Gustave Anderson's court, a justice of the peace of Omaha in and for

Douglas county, Nebraska, against the plaintiff, as sheriff, and took from plaintiff, on a writ of replevin, certain specific personal property, which the plaintiff had levied upon by virtue of an execution issued to him as sheriff out of the county court of Douglas county, Nebraska, against said Charles W. Mount.

"2. On the trial of said cause in said justice court, on the — day of August, A. D. 1888, the justice found that the right of property and the right of possession was in (this) plaintiff, and that the value of said property was \$200, and judgment was rendered against said Charles W. Mount, that (this) plaintiff have a return of said property, or the value thereof.

"3. The said Charles W. Mount did not return said property, but appealed said case to the district court of Douglas county, and did make an undertaking to this plaintiff in the sum of \$420, on the 18th day of August, 1888, of which the following is a copy:

"STATE OF NEBRASKA, }
DOUGLAS COUNTY. } ss.

"The State of Nebraska. In Justice Court. Before G. Anderson, a Justice of the Peace for 4th Precinct of Douglas County, Nebraska.

"CHARLES W. MOUNT
vs.
WILLIAM COBURN, SHERIFF. }

"Whereas on the 13th day of August, 1888, William Coburn, sheriff, recovered a judgment against Charles W. Mount before Gustave Anderson, a justice of the peace, for the sum of \$200, and costs of suit, taxed at \$—, and the said defendant intends to appeal said cause to the district court of Douglas county:

"Now, therefore, I, John P. Shoning, do promise and undertake to the said William Coburn, sheriff, in the sum of \$420, that the said Charles W. Mount shall prosecute his appeal to effect, and without unnecessary delay, and

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that said appellant, if judgment be adjudged against him on the appeal, will satisfy such judgment and costs.

“JOHN P. SHONING.

“Executed in my presence and surety approved by me, this 18th day of August, 1888.

“GUSTAVE ANDERSON,

“*Justice of the Peace.*’

“A transcript from said justice court was filed in the district court of Douglas county on or about August 20, A. D. 1888, as will be seen by reference to docket 10, page 6, of the records of said court.

“4. On the trial of said cause in said court on the 27th day of June, 1889, the right of property and the right of possession of said property was found to be in the defendant (William Coburn, sheriff,) at the commencement of said action, and that the value of said property was \$200, and the interest on the same was \$10.40. Whereupon judgment was rendered up against the plaintiff (Charles W. Mount) that the defendant have a return of said property, or the value thereof, \$200, and interest, \$10.40.

“5. Said Charles W. Mount had not returned nor offered to return said property.

“6. On the 30th day of December, A. D. 1889, an execution was issued to the sheriff of Douglas county on said judgment against Charles W. Mount, and returned wholly unsatisfied on the 8th day of January, 1890.

“On the 9th day of January, 1890, an alias execution was issued against said Charles W. Mount on said judgment, and returned on the 5th day of February, 1890, wholly unsatisfied.

“7. On or about the 12th day of November, 1889, John P. Shoning defendant, paid \$100 on said judgment.

“8. The plaintiff has sustained damages in the premises in the sum of \$142.08.

“9. The plaintiff therefore prays judgment against the defendant for the sum of \$142.08, with interest on \$210.40

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from the 13th day of May, 1889, to the 12th day of November, 1889, and on \$110.40 from the 12th day of November, 1889, and costs of this suit."

It is also claimed that it does not appear that the plaintiff below has exhausted his remedy at law as required by section 196 of the Code. In our view, the petition states a cause of action. It appears that the undertaking was given to the defendant in error; that the judgment of the justice was affirmed by the district court; that the property has not been returned and that executions have been issued against Mount and returned unsatisfied. If the plaintiff in error has returned or offered to return the property that is a matter of defense to which he is entitled, but it is sufficient on that point to allege in the petition that the property has not been returned. It is alleged in the answer that one J. F. Boyd is sheriff, and not the defendant in error, and that is not denied in the reply. We are unable to see any force in this objection. While the defendant in error is designated as sheriff, there is nothing to show that this is not a personal matter. The objection that his interest does not appear, is therefore unavailing. There is also an objection that the case was tried to the court, and it does not appear that a jury was waived. It is a sufficient answer to say that no objection appears to have been made on that ground in the court below and it cannot be made for the first time in this court.

On behalf of the defendant in error it is contended that where a jury is waived and the cause tried to the court that the judgment cannot be reviewed. This, however, is a mistake when applied to the district court, but in an action at law a motion for a new trial assigning the alleged errors arising on the trial must be filed and overruled before such rulings can be reviewed. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

GEORGE W. HOWELL V. ALMA MILLING COMPANY
ET AL.

FILED JANUARY 17, 1893. No. 4043.

1. **Parties: TRANSFER OF CAUSE OF ACTION: SUBSTITUTION.**
Where a plaintiff transfers his interest in the subject of the action to another during the pendency of the cause, the suit may be prosecuted to final termination in the name of the original plaintiff, or the person to whom the transfer is made may be substituted as plaintiff.
2. ———: ———: ———: **APPEAL BOND: SURETY.** A bank brought an action in a county court on two promissory notes held by it as collateral security, and recovered judgment thereon against the maker. The defendant took an appeal to the district court, the usual statutory bond being executed. While the cause was pending in the appellate court the indebtedness due the bank by the pledgor of the notes was paid, after which one H., to whom the said notes, prior to the bringing of the suit, had also been pledged as collateral security for a debt due him, subject to the claim of the bank, was substituted in place of the bank as plaintiff, who recovered judgment against the maker of the notes. *Held*, That the surety in the appeal bond or undertaking was not released by the substitution of H. as plaintiff.
3. **Appeal Bond: LIABILITY OF SURETY.** The mere continuance of a cause in an appellate court by stipulation of the parties, without the consent of the surety in the appeal bond will not operate to discharge such surety.
4. ———: ———. By an agreement between the parties to an appeal pending in the district court, a judgment was rendered therein against the party appealing, without the knowledge or consent of the surety on the appeal bond. *Held*, In the absence of proof of fraud or collusion between the principal and the creditor, that the stipulation for judgment did not release the surety from liability on the appeal bond.

ERROR from the district court of Harlan county. Tried below before GASLIN, J.

Smith & Solomon and *Morning & Keester*, for plaintiff in error.

36	80
47	225
36	80
51	217
52	235

Case & McNeny and C. C. Flansburg, contra:

The defendant in error Goble is not liable upon the bond, because the plaintiff in error was substituted for the Commercial National Bank without his consent after the giving of the bond and during the pendency of the action in the district court. (*Phillips v. Wells*, 2 Sneed [Tenn.], 154; *Harris v. Taylor*, 3 Id., 541; *Irwin v. Sanders*, 5 Yerg. [Tenn.], 287; *Smith v. Roby*, 6 Heisk. [Tenn.], 546.)

NORVAL, J.

This action was brought by the plaintiff in error upon an appeal undertaking. There was judgment in the court below for the defendants. To reverse this judgment a petition in error was filed in this court. The facts briefly stated are these:

On the 1st day of November, 1885, the Nebraska Lumber Company turned over a large number of notes to the Commercial National Bank of Omaha as collateral security for money borrowed. Among the notes so turned over were two against the Alma Milling Company; one for \$361.85 and the other for \$326, exclusive of interest. Afterwards, on the 30th day of December, 1885, the Nebraska Lumber Company assigned, subject to the rights of said bank, the same securities, including the said two notes executed by the Alma Milling Company, to the plaintiff, as collateral security for a debt from said lumber company to plaintiff.

On the 7th day of June, 1886, the said Commercial National Bank brought suit in the county court of Harlan county against the said Alma Milling Company upon the two notes above mentioned, and recovered judgment thereon for the sum of \$723.37 and costs. From this judgment the Alma Milling Company took an appeal to the district court, the defendant in error F. E. Goble signing the appeal bond or undertaking as surety; which bond was con-

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ditioned that the principal should prosecute its appeal to effect without unnecessary delay, and if judgment should be adjudged against it on appeal, satisfy such judgment and costs.

While said cause was pending on appeal in the district court the claim of the said Commercial National Bank against the Alma Milling Company, for the payment of which said notes were held as collateral security, was paid and discharged in full, so that said bank was no longer the real party in interest in said suit. The collateral notes were turned over to the plaintiff in error by virtue of the agreement above referred to, made between the Nebraska Lumber Company and said George W. Howell. After the notes were so turned over on the 23d day of November, 1881, the said Howell, the plaintiff in error herein, was substituted as a party plaintiff in said action in lieu of the Commercial National Bank. It was agreed between the plaintiff in error and the Alma Milling Company that in case the latter would consent or allow the former to be substituted as plaintiff for the bank that said cause should be continued to February 20, 1888; that in accordance with said agreement said cause was so continued without the knowledge or consent of the surety. Said cause was subsequently continued from time to time by stipulation of parties in open court until May 6, 1889, when judgment was rendered against said Alma Milling Company by agreement between it and the plaintiff for the sum of \$900 and costs of suit. Execution has been issued on said judgment and returned unsatisfied for want of property whereon to levy. Whereupon this action was brought upon said appeal undertaking to recover the amount of said judgment and costs.

It is contended by counsel for defendants in error that the substitution, after the cause was appealed to the district court, of plaintiff in error as party plaintiff in place of the Commercial National Bank, the original plaintiff, without

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the knowledge or consent of F. E. Goble, the surety in the appeal bond, operated as a release of the surety. We consider the position altogether untenable. We are unable to perceive how the substitution of George W. Howell as plaintiff in lieu of the bank could have the effect to discharge the surety. The reason for the substitution arose solely from the fact that the indebtedness of the Alma Milling Company to the bank had been fully paid off after the appeal had been taken. The bank, therefore, no longer had any interest in the litigation. The notes declared on, prior to the institution of the action, had been pledged by the Nebraska Lumber Company to plaintiff in error as collateral security for its indebtedness to him, so that when the claim of the bank was satisfied, plaintiff in error was entitled to prosecute the suit either in his own name or in the name of the bank.

Section 45 of the Code of Civil Procedure, which was in force when the appeal was taken, provides that "An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In the case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife; and, in case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." There can be no doubt that under this statute the payment by the Nebraska Lumber Company of its indebtedness to the bank did not abate the action on the collateral notes. The section quoted confers ample power upon a court, where there has been a transfer by the plaintiff of his interest in the subject of the action during the pendency of the suit, to allow the person to whom the transfer

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is made to be substituted in place of the original plaintiff. The substitution was made according to the provision of the statute. It is conceded that plaintiff in error had a right to be substituted as plaintiff in place of the bank, but it is urged that the surety is not liable on his bond for a judgment obtained by the substituted party against the principal. The law permitting the substitution of parties in case of the transfer of interest must have been known to the surety in the appeal undertaking when he became surety, and he must be held to have signed the bond subject to such contingency. In this case it is stipulated that at the time Goble signed the appeal undertaking he knew that the notes were held as collateral security, and was informed and believed that the claim of the bank against the Alma Milling Company would be paid by the collection of other securities held by the bank. The surety knew, in case the bank ceased to have any interest in the notes sued on during the pendency of the action, that the court had the power to permit the substitution of the party interested in the subject of the suit. The surety took this risk of substitution. He was not in the least prejudiced by the change of plaintiffs. The cause of action remained the same. He was not placed in a worse situation, for had there been no substitution Howell could have prosecuted the suit to judgment in the name of the original plaintiff. (*Magenau v. Bell*, 13 Neb., 247; *Temple v. Smith*, Id., 513; *Dodge v. Omaha & Southwestern R. Co.*, 20 Id., 276.)

The undertaking of the surety was that his principal should prosecute its appeal to effect without unnecessary delay, and that the principal should satisfy any judgment which should be rendered against it in the appeal. The surety was responsible for any judgment which should be rendered against the principal on the cause of action sued on, whether obtained by the original plaintiff or a substituted party. We are satisfied that the substitution of Howell as plaintiff in lieu of the bank did not release the

surety from liability on the appeal undertaking. (*Hanna v. International Petroleum Co.*, 23 O. St., 622; *Christal v. Kelly*, 88 N. Y., 285; *Sherry v. State Bank of Ind.*, 6 Ind., 397.)

There are some Tennessee decisions cited in the brief of counsel for defendants in error which are not in harmony with the views we have already expressed, but they are not well considered cases, and are in conflict with the weight of authority in this country.

The case of *Andre v. Fitzhugh*, 18 Mich., 93, is distinguishable from the one at bar. There an attachment suit was commenced against three defendants, and the sheriff levied the writ upon certain personal property. To prevent the removal of the attached property, a statutory bond with sureties was executed, conditioned that if the obligors should well and truly pay any judgment which might be recovered by the plaintiff in his attachment suit within sixty days after the judgment should be recovered, then the obligation should be void, but otherwise of force. On the trial of the attachment suit the plaintiff discontinued as to two of the defendants in attachment without the consent of the sureties, and obtained judgment against the third for \$4,692.61. The judgment not having been paid, suit was commenced upon the bond to recover the amount of said judgment. The supreme court ruled that the discontinuance as to the two defendants in attachment operated as a discharge of the sureties on the bond. This decision is placed upon the ground that the discontinuance as to the two defendants increased the risk of the sureties. The court in the opinion say: "The sureties on entering into the contract measure the risk they incur by the chances which the plaintiff has to recover against the defendants in the writ and the ability of the latter in case of defeat to refund to the plaintiff or sureties themselves, if called on." The court in speaking of such change of parties say: "It would have the effect to com-

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pel the sureties to look for indemnity to such defendant or defendants as should be left in the case at judgment, instead of the whole number of defendants named in the writ at the giving of the bond; and it might well happen that in the responsibility of the latter the sureties would know themselves to be safe, while in that of the former they would know themselves to be without remedy."

In the case we are considering, the risk of the surety was not increased by the substitution of Howell as plaintiff; hence the Michigan case is not in point. The fact that the original suit was continued from time to time by agreement, without the consent of the surety, did not operate as a release of the latter, nor did the rendition of the judgment by consent of the principal in the bond have the effect to discharge the surety from liability. The court had the power to grant the continuances irrespective of the agreement of the parties. Had it done so on the application of either party without the consent of the other, the surety would have been bound, since his undertaking contemplated a possible exercise of such power. The fact that the continuances were granted upon the stipulation of the parties does not, we think, make any difference. By the execution of the appeal bond the surety conferred upon his principal authority to do everything that was necessary to be done in the case. The condition of the bond was sufficiently broad to include whatever judgment might be rendered against the principal in the appeal case, whether by agreement or otherwise. In the absence of proof of fraud or collusion between the principal and the creditor, the stipulations did not have the effect to release the surety from liability on the appeal bond. (*Boynton v. Phelps* 52 Ill., 210; *Bailey v. Rosenthal*, 56 Mo., 385; *Chase v. Be-
raud*, 29 Cal., 138.)

Boynton v. Phelps, *supra*, was an action against a principal and his sureties upon an injunction bond given in a suit brought by a judgment debtor to restrain the collec-

tion of a judgment at law. The plaintiff in the injunction suit, without the consent of his sureties, dismissed his action by agreement with the owner of the judgment. It was held, in the absence of fraud and collusion between the parties, that the mere dismissing of the injunction suit by consent did not discharge the sureties on the bond.

In the Missouri case cited the defendant appealed from a judgment rendered by a justice of the peace, and in the appellate court the plaintiff took a voluntary nonsuit, which was subsequently, during the same term, set aside by agreement between the parties without the consent of the sureties on the appeal bond. The case was then tried and judgment was rendered against the defendant and his sureties. It was held that the sureties were liable for such judgment.

In *Chase v. Beraud*, *supra*, it was decided that where an appeal was dismissed by agreement between the principal in the appeal bond and the creditor, it operates as an affirmance of the judgment and charges the surety in the appeal bond.

In *Ammons v. Whitehead*, 31 Miss., 99, certain parties became sureties on three bonds given to secure appeals from three judgments rendered by a justice of the peace against the same defendant and in favor of the same plaintiff. In the circuit court the three cases were consolidated by agreement of the parties and afterwards, by stipulation between the principal and creditors, without the assent of the sureties, a judgment was rendered in said court against the principal and sureties with stay of execution for twelve months. It was held that the sureties were not released from their liability. This being a well considered case we reproduce a portion of the opinion here. The court said that "the bonds were executed for the purpose of having the cases retried in the circuit court, and their legal effect was to give that court jurisdiction to determine the cases, and to render judgment, if necessary, against both the

principal and sureties. Their condition was, substantially, that if the judgments should be there affirmed, they would abide by and perform the judgment of the court to be rendered thereupon. From their very nature, the obligation of the sureties was contingent and uncertain. They were given for the express purpose of enabling the principal to carry on the litigation, and, in the event that he should be unsuccessful, the law under which they were given provided that the judgment should be rendered against both the principal and sureties. Even if the sureties are not to be considered bound as parties to the judgment, so as to be debarred of the right to complain in a collateral proceeding of what was done in the proceeding, the necessary legal effect of their execution of the bonds was to confer upon the principal full power to do whatever he might deem necessary and proper in defending or determining the suits in the circuit court. The principal might have withdrawn all defense and submitted to judgments in the three cases immediately upon their presentation in the circuit court, and upon the same reason he was authorized to compromise the suits upon terms advantageous to himself. This was no violation of the obligation of the sureties, nor a variation of the terms of their obligation, for that was entirely contingent and uncertain, except that the parties had, by the necessary legal effect of the act, submitted themselves to whatever might be done in the determination of the suit by their principal, under the sanction of the court. There was no fixed obligation, the terms of which were varied by the creditor and principal, so that the sureties were deprived of the right of subrogation; nor did the stay of execution deprive them of any right or security which existed in their behalf before the rendition of the judgment and the entry of the stay. And whether the sureties be regarded as parties to the judgment, and as such bound by the proceedings in the suit, or as bound by the action of their principal by reason of the power necessarily

conferred upon him by the purpose and legal effect of the bonds, it is clear that the sureties are not within the rule which discharges such parties in consequence of indulgence given to their principal."

The cases on which defendant relies are not in point, as a brief reference to them will show. In *McKay v. Dodge*, 5 Ala., 388, two parties agreed to submit certain matters in dispute between them to the award of certain specified persons. Afterwards a third person signed, as surety, a bond for one of the parties, conditioned that the principal would perform the award which might be made against him on the submission. Subsequently, without the consent of the surety, by agreement between the parties two persons were substituted in place of two of the arbitrators, who failed to attend, and an award was made. The court held in an action on the bond that the change in the arbitrators was such an alteration of the original contract as exonerated the surety from liability. It is plain that there was a material change in the contract. The surety obligated himself that his principal should perform an award made by certain designated arbitrators, and not one made by any other or different person. The change of arbitrators was a new contract, which was not binding on the surety. *Johnson v. Flint*, 34 Ala., 673, was a suit on a bond executed to secure an appeal of a cause to the supreme court. In the appellate court an agreement was entered into between the parties to the appeal, without the knowledge or consent of the sureties on the appeal bond, to the effect that the judgment should be affirmed for a specified sum, which was \$400 less than the superseded judgment, and that a certain mill and machinery in controversy were to be the property of the appellee. It was held that the sureties on the bond were released. The ground of this decision is that by the new agreement entered into without the consent of the sureties, founded upon a sufficient consideration, by which the parties stipulated for mutual advantages, the

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principal was precluded from prosecuting his suit to effect. In the case at bar the contract of the sureties was not varied or changed. The agreement between the creditor and principal, that judgment should be rendered against the latter, was a mere voluntary and discretionary exercise of authority on the part of the principal. He secured no concessions or advantage for signing the agreement. There was merely a waiver by the principal of his defense to the suit, if he had one, and of such a waiver all the authorities hold the surety cannot take advantage. We are persuaded that the mere fact that the principal consented to the rendition of the judgment does not affect the liability of the surety. *Johnson v. Planters' Bank*, 43 Am. Dec. [Miss.], 480, was an action against Johnson as surety on a promissory note. The principal on the note had died and his estate was regularly administered, but the note had not been presented as a claim against the estate within the time prescribed by statute. It was decided that the surety was not thereby discharged. The case lacks analogy and is not an authority on the question we are considering. The other cases cited by counsel for the defendant are not in point.

We are forced to the conclusion that the district court erred in holding that the surety was not liable. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. CHESTER NORTON,
V. CHARLES VAN CAMP, COUNTY CLERK, AND
JAMES G. KRUSE, INTERVENOR.

FILED JANUARY 17, 1893. No. 5880.

36	91
87	313
36	91
46	533
46	737

1. **Certificate of Election: DUTIES OF CANVASSING OFFICERS:**
MANDAMUS: STATE LEGISLATURE. While each house of the legislature is, by the constitution, made the judge of the election and qualification of its members, the courts will, by *mandamus*, compel the proper canvassing officers to discharge their duties and issue certificates of election to the parties who, from the returns, appear to have been elected thereto, but the awarding of a certificate of election in obedience to the mandate of the court will not conclude the legislature in determining the question in proceedings by contest.
2. **Supreme Court: INTERPRETATION OF CONSTITUTIONAL AND STATUTORY PROVISIONS.** An interpretation given to a statutory or constitutional provision by the court of last resort becomes a standard to be applied in all cases, and is binding upon all departments of the government, including the legislature.
3. ———: ———: **ELECTIVE FRANCHISE: REPRESENTATION.** It is contemplated by our constitution and the election laws enacted in pursuance thereof that every qualified elector of the state shall be entitled to vote at some precinct or voting place for the respective state and county officers at each election. Hence, a construction will not be adopted which would have the effect to disfranchise a considerable number of voters or to deprive a county of representation in the legislature unless such construction is rendered necessary by express and unequivocal language of the statute or constitution.
4. **County Organization: UNORGANIZED TERRITORY: REPRESENTATIVE DISTRICTS.** B. county was organized in 1891, at which time it was unorganized territory, and has never, by general apportionment law or special act, been attached to any representative district. It is a narrow strip lying between H. county and the northern boundary of the state, eight townships long from east to west and has less than three townships in width. It adjoins K. county along its entire eastern boundary, although further west it extends north to the 43d parallel about

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ten miles beyond the northern boundary of K. county, at which point it is bounded on the east by the state of South Dakota. *Held*, That it is directly west of K. county, within the meaning of section 146, chap. 18, Comp. State., and was, while unorganized territory, attached to said county for election purposes. MAXWELL, Ch. J., dissents.

5. ———: ———: ———. The legislature never having attached it to any representative district, it remains a part of the 20th district, notwithstanding its organization as a county. MAXWELL, Ch. J., dissents.
6. **Extension of County Boundaries: UNORGANIZED TERRITORY: ELECTIONS.** In 1883 an act was approved extending the boundaries of H. county directly north, so as to include the unorganized territory which is now B. county, but providing that it should not take effect until a majority of the legal voters of said county should give their assent at the next general election. At the general election in 1883 there were cast in said county 1,821 votes, of which 878 only were in favor of said proposition. *Held*, That the proposition was defeated, and an order entered by the county board in 1885 declaring it adopted is a nullity.
7. ———: ———: ATTACHMENT OF COUNTIES FOR ELECTION PURPOSES. The boundaries of H. county being clearly defined by law, and not including any part of the territory subsequently organized as B. county, *held*, there could be no *de facto* attachment of the latter to the former so as to entitle the voters thereof to participate in elections in H. county. MAXWELL, Ch. J., dissents.
8. **Election Returns: DUTIES OF CANVASSING BOARD: CERTIFICATES OF ELECTION.** It is settled by a long line of decisions of this court that a canvassing board has no authority to go behind the returns and inquire into the legality of the votes. Their duty is to canvass the votes as certified to them, and a certificate of election issued upon a canvass of a part of the vote of a representative district is without authority of law, and void.
9. **Regularity of Nomination of Candidates: CERTIFICATES.** Neither a canvassing board nor the court in a *mandamus* proceeding will inquire into the regularity of the nomination of the candidates, nor the sufficiency of their certificates of nomination. MAXWELL, Ch. J., dissents so far as it applies to courts.
10. ———. *Held*, On the proofs, that the nomination of the relator was regular and sufficient in form and substance. MAXWELL, Ch. J., dissents.

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11. **Construction of Election Law.** Provisions of the election law which are not essential to a fair election will be held to be formal and directory only unless declared to be mandatory by the law itself.
12. **Written and Printed Ballots.** The vote of B. county for the relator should not be rejected, for the reason that his name was written on the sample and official ballots by the clerk after they had been printed and were ready for distribution. MAXWELL, Ch. J., dissents.
13. **Ballots: DESIGNATION OF REPRESENTATIVE DISTRICT.** Votes for representative will not be rejected because the number of the district is not designated upon the official ballot in counties included in one district only.

ORIGINAL application for *mandamus* to compel the respondent, Charles Van Camp, county clerk of Knox county, to call to his assistance two disinterested electors of the twentieth representative district, and with them compare the abstracts of votes cast at the election held November 8, 1892, made by the canvassing boards of the counties of Knox and Boyd for representative, and returned to said county clerk of Knox county by the county clerks of said counties, and issue to the person appearing from said abstracts to have the highest number of votes a certificate of election as representative from said twentieth district in the legislature of Nebraska to convene January 3, 1893. *Writ allowed.*

A. W. Agee, for relator.

A. J. Sawyer and Thomas H. Matters, contra

POST, J.

It is an elementary rule that the writ of *mandamus* will be denied unless the right of the petitioner to the relief demanded is clear. That rule applies with especial force to cases like the one under consideration, where the subject of the controversy is the office of representative in the legis-

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lature. It is a fact known to all, and to which we cannot close our eyes, that in like cases, particularly in times of unusual political excitement, partisan bias and prejudice are liable to be imputed to judges on account of the soundest decisions, and by men who would without hesitation submit to their judgment controversies involving their fortunes and their honor. It is not my purpose to comment upon this peculiarity of our national character, or to condemn it as existing without sufficient cause. But attention is directed to it as an additional reason why the courts of the country should refuse to interfere, except in cases where the right is clear and the duty plainly enjoined by law. I have, however, no hesitation in saying that this case is clearly within both the letter and the spirit of the rule. In fact, there is no question of law involved herein but has been settled by repeated decisions of this court, to which I will hereafter refer. But before discussing the case upon its merits I will notice the argument against the jurisdiction of the court, on the ground that the house of representatives is made the exclusive judge of the election and qualification of its members, and that the judgment of the court would tend to forestall action by the law making power, although that argument is too trite to call for especial notice at this time. The courts *have* jurisdiction in such cases, fortunately for the cause of constitutional government. That fact is too well settled to admit of controversy. As said by Judge McCrary, in his work on the *Law of Elections*, 350: "The courts will not undertake to decide upon the right of a party to hold a seat in the legislature where by the constitution each house is made the judge of the election and qualification of its own members, but a court may, by *mandamus*, compel the proper certifying officers to discharge their duties and arm the parties elected to such legislative body with the credentials necessary to enable them to assert their rights before the proper tribunal."

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It is contemplated that each house of the legislature shall be organized by the persons who are *prima facie* members thereof. It requires no argument to prove the disastrous consequences of a different construction of the constitution. An illustration is quite sufficient for the purpose. In *State, ex rel. Christy, v. Stein*, 35 Neb., 848, and two other cases involving the same issues recently decided by this court, the controversy was, who upon the face of the returns were entitled to certificates of election. Suppose the respondent, the clerk of Clay county, had issued certificates to the relators therein, will it be contended that the court would have been powerless to afford relief, and that the relators must have been permitted to participate in the organization of the legislature to which they were not elected, simply because the canvassing officer had been guilty of misfeasance or malfeasance in office? Yet the case at bar is much stronger on its merits than the imaginary one. Here the question of the relator's right to a certificate of election is but an incident to the more important question of the rights of the people of Boyd county to representation in the popular branch of the legislature. For it is too plain for argument that unless said county is included within the twentieth representative district, the people thereof are disfranchised so far as representation in the house is concerned; and that such anomalous condition must continue until 1899, which will be the first legislature elected under the next apportionment law. It is also argued against our jurisdiction that the house of representatives will not be bound by the judgment of the court and may entirely ignore or defy its authority. It must be confessed that legislative bodies frequently fail to distinguish clearly between the power and the right in questions involving party supremacy. This is a weakness common to parties and of which all have furnished conspicuous illustrations. But our duty as well as our responsibility ends with a determination of the controversy submitted to us. It may

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be suggested, however, in this connection that there are some things which are conclusively presumed and which no court will permit to be questioned in advance, among which is that a co-ordinate branch of the government will not resort to revolutionary methods. A careful examination into the subject will prove that there can be no conflict of jurisdiction between the legislative and judicial departments of the government. The extent to which judicial power will be exercised is to compel ministerial officers to discharge their duty and issue certificates of election to the parties entitled thereto upon the face of the returns, leaving it to the legislature to determine the question of the validity of the election.

The last proposition, however, is subject to one qualification, viz., where the court of last resort has placed a construction upon a constitutional or statutory provision, such construction is binding upon all departments of the state government including the legislature. (See Cooley's Const. Limitations [5th ed.], 55, 56.) As said by one of the ablest of authors, "an interpretation of an act by the court of last resort under a constitutional government becomes a part of the act itself." An illustration of this rule is found in the case of *State v. Van Duyn*, 24 Neb., 586. By the legislative apportionment act of 1881, Sarpy county comprised the eighth representative district and was entitled to one representative. That act was repealed by the act of 1887, which provides that the eighth district shall consist of Cass and Otoe counties, but making no provision for a representative from Sarpy county. It was held in the case named, the present chief justice delivering the opinion of the court, that the legislature could not deprive a county of representation in that body, hence the present apportionment law is unconstitutional so far as Sarpy county is concerned and that county is entitled to a member of the house under the former act. The judgment of the court in that case was certainly binding upon

the legislature, and while the house may have the power, it would have no more right to exclude the member elect from that county than from any other county of the state.

2. This controversy is between Norton, the relator, and Kruse, the intervenor, who were at the late election the candidates of the republican and independent parties for representative of twentieth representative district.

In Knox county the vote as returned and canvassed is as follows:

Kruse, independent.....	723 votes
Norton, republican.....	681 "
Sherman, democrat.....	509 "
Buckmaster, prohibition.....	112 "

In Boyd county the vote as canvassed and returned to the county clerk of Knox county is—

Norton.....	201 votes
Kruse.....	4 "
Sherman.....	30 "

It is apparent from the above tables that if the relator is entitled to have counted in his favor the votes cast in Boyd county he is entitled to the certificate of election and the writ of *mandamus* was properly allowed. The apportionment act of 1887 provides that Knox county shall comprise the twentieth representative district and be entitled to one representative. But by sections 146 and 147 of chapter 18, Comp. Stats., entitled "Counties and County Officers," it is provided as follows:

"Sec. 146. All counties which have not been organized in the manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county directly east for election, judicial, and revenue purposes; * * * *Provided further*, That if no county lies directly east of any such unorganized territory or county, then such unorganized territory or county shall be attached to the county directly south, or if there be no such county, then to the county directly north, and if there be no county

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directly north, then to the county directly west of such unorganized territory or county.

"Sec. 147. The county authorities to which any unorganized county or territory is attached shall exercise control over, and their jurisdiction shall extend to, such unorganized county or territory the same as if it were a part of their own county."

Repeated constructions have been given to the above provision by this court, uniformly to the effect that for all purposes of county government unorganized territory is attached to the nearest county directly east thereof. For instance, in *Ex parte Crawford*, 12 Neb., 379, it was held that the district court of Holt county had jurisdiction to punish for crimes committed in the unorganized territory directly west of that county. In the opinion of the court LAKE, chief justice, says: "As to these three purposes (election, judicial, and revenue) there are no restrictive or qualifying words in the act, but the attachment becomes complete and said territory to all intents made practically a part of that county. Indeed this effect is made still more manifest, if possible, by reference to the next section which provides [quoting section 147]. The full extent of such jurisdiction and control can be correctly measured only by a resort to all the various laws relative to county officers and their duties respecting election, judicial, and revenue matters."

Boyd county was organized in pursuance of an act approved April 9, 1891, and is a strip eight townships in length extending from east to west and less than three townships in width at the widest point, all of which, with the exception of a small fraction, was acquired by this state under the provisions of an act of congress approved March 23, 1882, and which was, at the time named, within the boundary of Dakota Territory. The act above mentioned also provides that the jurisdiction of this state shall not attach to the territory so acquired until the extinguishment

of the Indian title thereto, and the announcement thereof by proclamation of the president; which, according to admissions of counsel, was October 23, 1890. It is apparent from an examination of a correct map of the state that under the general act referred to this territory could be attached to no organized county of the state other than Knox for any purpose. It is bounded on the east by Knox and no other county of the state. It is true the line of the eastern boundary is short, not exceeding one congressional township and a half. It is also true that the northern boundary extends about the same distance beyond the northernmost limit of Knox county and lies directly west of a portion of South Dakota. It is a rule of construction, universally recognized, that acts which confer or extend the elective franchise should be liberally construed. (See Sutherland, Stat. Con., sec. 441.) Here is a prosperous county of the state rapidly developing in population and wealth which it is proposed to disfranchise upon the barest technicality, for there is no provision for the dividing of unorganized territory between two or more counties except that contained in section 148, which is that where two or more counties lie directly east of an unorganized county "the portions of territory of such unorganized county which lie either north or south of a line running directly west and in continuation of the boundary line between such organized counties shall be attached to the organized county directly east of such territory for all purposes of this subdivision." A statute should never be so construed as to work a public mischief, unless such construction is required by the explicit and unequivocal language of the act or by necessary implication therefrom. (*People v. Lambier*, 5 Denio [N. Y.], 9; *Smith v. People*, 47 N. Y., 330.) In Sutherland, Stat. Con., sec. 323, it is said: "But an interpretation of a statute which must lead to consequences which are mischievous and absurd is inadmissible, if it is susceptible of an interpreta-

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tion by which such consequences may be avoided." The opinion of the chief justice in *State v. Van Duyn*, *supra*, is regarded as a leading authority in support of the above rule and is without doubt directly in point. We should adopt that construction, when possible, which will secure to the people of the state their constitutional right to vote for and be represented by officers of their choice, although such construction may not be the most obvious or natural from the language of the statute.

3. It follows that on the extinguishment of the Indian title to the territory now comprising Boyd county, and notice thereof by the proclamation of the president, said territory, by virtue of the general statute, became attached to Knox county for election purposes and became a part of the twentieth representative district, and has never been attached to any other representative district, either by general or special act. It is settled beyond controversy in this state that the legislature cannot, under the pretense of subdividing a county or the state for election purposes, disfranchise a part of the people by making no provision for the exercise of their constitutional rights. In addition to *State v. Van Duyn* see *Peard v. State*, 34 Neb., 372, and authorities cited. It is not the province of the courts to supply omissions by the legislature, but, as said by Judge Niblack, in *Duncan v. Shenk*, 109 Ind., 26, "Our election laws were enacted upon the evident theory that every qualified voter of the state is entitled to vote at some precinct or voting place at every election except when restrained by some provision of the state constitution."

4. The chief justice has filed a dissenting opinion in which he argues that Boyd county is for election purposes attached to Holt county. Before noticing the reasons advanced for his conclusion I will say that in my opinion the boundaries of Holt county are clearly defined by law, and there could be no *de facto* attachment thereto of Boyd county for election purposes; hence the objection to the

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proofs of the intervenor upon that branch of the case is so obviously sound as to render further examination unnecessary. The only warrant for the claim that Boyd county is attached to Holt county for any purpose is the act of March 1, 1883, providing that all of said territory should be attached to the last named county, provided a majority of the legal voters thereof should give their assent to the proposition at the next general election. At the general election of 1883 there were cast 1,821 votes in said county, of which 872 only were in favor of said proposition. It is clear, upon authority, that the proposition was defeated. (*State v. Lancaster Co.*, 6 Neb., 474.) And such appears to have been the understanding at the time, for one of intervenor's witnesses, a resident of Holt county, testifies that it was generally understood that the proposition was defeated, and that the county clerk refused to certify that it had carried. But on the 23d day of January, 1885, a resolution was adopted by the county board declaring it carried. It appears, however, from the several acts of the legislature, subsequent to 1883, that the territory in question was always, prior to the organization of Boyd county, regarded as unorganized territory. For instance, in the judicial apportionment of 1887 the twelfth district included Holt county and the unorganized territory north of said county, and by the legislative apportionment act of 1887 the thirteenth senatorial district includes the unorganized territory north of Holt county. The attaching of said territory to judicial and senatorial districts which adjoin it on the south, but not on the east, without reference to it in the section defining representative districts, indicates an intention on the part of the legislature for it to become, when the Indian title should be extinguished, a part of the twentieth representative district, by virtue of the general statute. But if anything is lacking in the way of legislative construction it is supplied by the act creating Boyd county, which provides that "The unorganized

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territory lying north of Holt county be organized into a new county and be called Boyd county." (Laws of 1891, 224.)

5. I observe from the opinion of the chief justice that he has overlooked several material facts, which is due, no doubt, to the lack of time for its preparation, since it appears to have been filed before there had been an opportunity to assign the case to a member of the majority to prepare the opinion of the court. For instance he says: "The proof shows beyond question that Boyd county has in fact been attached to Holt county from 1883 to 1890; that two years ago one of the representatives from the district comprising what is now Holt and Boyd counties was a resident of Turtle Creek township, in what is now Boyd county; that a supervisor from that precinct sat with the supervisors of Holt county and the latter levied taxes in that county which were collected and paid. These things were a matter of record which seems to have been kept in Holt county. This state of affairs continued until Boyd county was organized two years ago. There is no proof to the contrary on this point, so that it is established beyond a doubt." It does appear from the testimony of witnesses that for the years 1888 and 1889 Turtle Creek township, now a part of Boyd county, elected a supervisor who sat with the county board of Holt county, and that the last named county assessed and collected taxes on the property in said township for the years named. It also appears that a resident of Turtle Creek township was in the fall of 1890 a candidate for the office of representative from Holt county. Further than this the foregoing statement is not warranted by the proofs. There is no evidence within my knowledge of the case that Holt county ever exercised or claimed jurisdiction for any purpose over any part of Boyd county, aside from the township above named, or at any time prior to the year 1888, nor is the ground of its assumed jurisdiction over a fraction thereof appar-

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ent from the record. Had a resident of Boyd county been permitted to represent Holt county in the legislature, that fact might be regarded as a legislative construction of more or less weight, but the assertion of the chief justice is contradicted by the undisputed proofs, which show that the candidate referred to was defeated. There is, however, one fact which alone is conclusive of the question of a *de facto* annexation, viz., since the approval of the act creating Boyd county there has been no person in either county, so far as the record discloses, who has ever regarded that county as a part of the fiftieth representative district which is comprised of Holt county. That district is entitled to two members of the house and it is fair to presume that there were, at the election in 1892, at least four candidates for representative. Yet we have no evidence that certificates of nomination were filed by any of them in Boyd county. On the other hand it is apparent that said county was regarded by all of the leading political parties as a part of the twentieth district, since it appears from the documentary evidence that on the 16th day of September, 1892, the certificate of nomination of Z. G. Sherman, by the democratic party of the twentieth representative district, was filed with the clerk of Boyd county. On the 15th day of October following the certificate of the relator was filed in said county and on the 24th day of October fifty-three persons, claiming to be electors of the twentieth district, filed a petition, in due form, requesting the clerk of said county to place the name of Kruse, the intervenor, on the ticket as the independent candidate for representative from said district. The clerk having refused to place the name of the relator upon the official or sample ballot, the latter applied to Hon. M. P. Kinkaid, one of the judges of the fifteenth judicial district, for a writ of *mandamus* requiring the clerk to print his name on the ballot, which application was heard upon sufficient notice and the writ allowed as prayed.

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It is suggested by the chief justice that the petition above referred to was filed by friends of Kruse without his knowledge, after the institution of the *mandamus* proceeding, but here, too, he misconceives the record. The intervenor's petition aforesaid was filed in Boyd county October 24, while the application for the writ of *mandamus* was not made until the next day. It further appears from the poll book introduced in evidence that at the general election in 1890, at which the intervenor was a candidate for representative from the twentieth district, there were cast by residents of Boyd county at the nearest polling place in Knox county seventy-nine votes, of which eight only were challenged. The question of the legality of these votes is not involved in the present controversy, but reference is made to them for the purpose of showing that so far as there existed a *de facto* annexation of that territory to any organized county it was to Knox and not to Holt county.

6. The chief justice further says: "There is no proof that a call for a convention of this kind (of Knox and Boyd counties) was made by any one; or that the republicans of Boyd county were invited or even notified to attend. * * * No doubt the convention in this case was a fair convention of Knox county, but it should appear from the proof that Boyd county was invited to participate therein." There is no proposition more firmly settled by decisions of this court than that neither the canvassing board nor the court in a *mandamus* proceeding will go behind the returns and inquire into the legality of the votes. (*Hagge v. State*, 10 Neb., 51; *State v. Stearns*, 11 Id., 106; *State v. Peacock*, 15 Id., 442; *State v. Wilson*, 24 Id., 139; *State v. Elder*, 31 Id., 169.) In the first case cited above the present chief justice, referring to canvassing officers, uses the following pertinent language: "Their duties are purely ministerial. If illegal votes have been cast or irregularities occurred affecting the right of the person declared elected to office the law provides for contesting such

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election, but a canvassing board cannot go behind the returns." And in the last named case in which a writ of *mandamus* was allowed against the speaker of the house of representatives requiring him to open and publish the returns of the election for state officers, he says: "The rule is that each board is to receive the returns transmitted to it, if in due form, as correct, and ascertain and declare the result as appears from such returns." On the authority of the cases cited it is clear that we have no right to inquire into the regularity of the relator's nomination. However, authorities directly in point are not wanting. In *People v. Shaw*, N. Y. Court of Appeals, 31 N. E. Rep., 512, and *State v. Board of Canvassers of Cascade Co.*, 31 Pac. Rep., 536, Sup. Court Mont., both arising under the Australian ballot law, it is held that the canvassers could not go behind the returns for the purpose of inquiring into the legality of the nomination of the candidates. But it is apparent that the nomination of the relator was regular and sufficient, both in form and substance. It will be observed that the chief justice does not say that there was any offer to show that Boyd county was not in fact represented at the convention in question. The truth is, there was no such proof. But suppose, for the sake of argument, that such was the fact and Boyd county was not included in the call for the convention and was not represented therein. The court will not so construe the law as to disfranchise the voters of that county for any such irregularity. A strong case in this court is *State v. Thayer*, 31 Neb., 82, in which it was held that an election to fill a vacancy in the office of district judge was valid, although the notice prescribed by law for such an election had been entirely omitted on the ground that such provision is merely directory.

7. As to the form of the certificate, which is set out at length below, it is doubtful if there has ever been one more formal and complete filed in any office in the state:

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"THE STATE OF NEBRASKA, }
KNOX COUNTY. } ss.

"We, W. H. Needham, chairman, and E. H. Purcell, secretary, presiding officers and secretary of the republican convention of the twentieth representative district of Nebraska had and held in Creighton, in Knox county, state of Nebraska, on the 26th day of July, 1892, pursuant to a call for the purpose of making nomination to public office for said representative district as the candidate of the republican party, certify that the said convention was made up and composed of electors representing the republican party, being a political party which, at the last election before holden, said representative district convention polled at least one per centum of the entire vote cast in said district; that said convention was duly organized by the election of W. H. Needham, a resident of Bloomfield, of Morton township, in Knox county, as its chairman and presiding officer, and by the election of E. H. Purcell, of Verdigris township, in Knox county, as secretary, members of said convention, and that the following nomination was made by said convention, resident of said representative district, at the place immediately following the name, to-wit: For representative of twentieth district of Nebraska, *Chester A. Norton*, of Morrillville P. O., Knox county, Nebraska. The said named person is a regular nominee of the republican party of said twentieth representative district of Nebraska for the respective office immediately preceding his name, and his name should be printed on the sample and official ballots as a candidate of the republican party in and for said representative district for said office.

"W. H. NEEDHAM,

"Chairman of the republican party of the twentieth representative district of Nebraska, residence in said representative district at Bloomfield, Knox county, Nebraska.

"_____.

"Secretary of the republican party of the twentieth representative district of Nebraska, residence in said representative district, Verdigris P. O., Knox county, Nebraska.

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"THE STATE OF NEBRASKA, }
KNOX COUNTY. }

"I, W. H. Needham, being first duly sworn, depose and say that I am a resident of Bloomfield, in Morton township, in said county and state; that I was duly elected chairman and presiding officer of the republican convention of the twentieth representative district of Nebraska, had and held at Creighton, in said county, on the 26th day of July, 1892; that I signed the written certificate of nomination as chairman and presiding officer of said convention, and that said certificate and the statements therein contained are true to the best of my knowledge and belief.

W. H. NEEDHAM,

"Chairman.

"Sworn to before

W. C. MILLER,

"Notary Public of Knox Co.

"THE STATE OF NEBRASKA, }
KNOX COUNTY. }

"I, E. H. Purcell, being first duly sworn, depose and say that I am a resident of Verdigris, in Verdigris township, in said county and state; that I was duly elected secretary of the republican convention of the twentieth representative district of Nebraska, held at Creighton, in said county, on the 26th day of July, 1892; that I signed the written certificate of nomination as such secretary, and that said certificate and the statements therein contained are true to the best of my knowledge and belief.

"E. H. PURCELL,

"Secretary.

"Sworn to before

D. E. JOHNSON,

"Notary Public, Knox Co."

8. The chief justice further says: "It is true the name of the relator is written on both the sample and official ballots, but this does not comply with the law. That requires them to be printed on both." It should be stated in this connection that the clerk of Boyd county, after the

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writ of *mandamus* had been served upon him, wrote the relator's name with ink upon both the official and sample ballots which had been printed and were ready for distribution, presumably to save the cost of printing others. It was held by this court in *State v. Russell*, 34 Neb., 116, that the provision of our law for the making of ballots with ink is directory only, and that ballots otherwise regular should not, in the absence of fraud, be rejected because they are marked with a pencil. In the absence of a plain provision to the contrary, a printed instrument will be held to comply with a statute providing for a written one. In *Temple v. Mead*, 4 Vt., 535, it was held that printed ballots are within the meaning of a constitutional provision requiring them to be "fairly written." And to the same effect is *Henshaw v. Hoster*, 9 Pick. [Mass.], 312. This court has uniformly held those provisions of the election law to be formal and directory merely, which are not essential to a fair election unless declared to be mandatory by the statute itself. In the appendix to Mr. Wigmore's *Treatise on the Australian Ballot Law*, he says: "Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot, as an institution, is to obtain a correct expression of intention, and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials, that is, as objects in themselves, and not merely as means." There is no claim that the writing of the relator's name on the ballots was a distinguishing mark within the meaning of the statute, and it is plain that it was not. (*State v. Russell, supra.*) We cannot adopt the strict construction contended for by the chief justice, without reversing a well recognized rule of this court, and disregarding the settled law on the subject.

9. There is still another objection argued by counsel, viz., that the votes cast for the relator in Boyd county are void

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for the reason that the number of the district was not designated upon the ballots. Upon both the official and sample ballots his name appears under the following printed direction: "For representative — district. Vote for one." In *State v. Howe*, 28 Neb., 618, it was held that words descriptive of the district do not constitute a part of the legal designation of the office, and may be treated as surplusage. That case is conclusive of the question now under consideration. The question of the effect of such an omission in counties included within two or more districts is not involved in the objection and is not determined. The tendency of the judiciary should always be in the direction of conservatism, and any encroachment upon the powers conferred upon the other departments of the government should be strenuously resisted. The questions involved in this case, however, are purely judicial, and, as has been shown, have all been settled by previous decisions of this court. Boyd county is not only a part of the twentieth representative district, but the nomination of the relator is in substantial compliance with law, and the votes cast for him in said county should be counted in his favor. Since it was the duty of the canvassing board to canvass all the votes certified to it from the counties of Knox and Boyd and to issue a certificate to the party appearing therefrom to have been elected, the certificate issued to the intervenor upon a canvass of the vote of Knox county only is without authority of law, and void, and the writ of *mandamus* should be allowed as prayed.

WRIT ALLOWED.

NORVAL, J., concurs.

MAXWELL, CH. J., dissents. See *ante*, p. 9.

JOHN CURTIN ET AL. V. MARIA ATKINSON.

FILED JANUARY 17, 1893. No. 3731.

1. **LIQUORS: DEALER'S BOND: CONSTRUCTION: LIABILITY OF SURETIES.** An undertaking will be strictly construed in favor of sureties and their liability will not be extended by construction beyond their specific agreement.
2. — : — : —. The term traffic in intoxicating drinks, as used in section 15, chap. 50, Comp. Stats., will, in action on a license bond, be held to mean the sale or furnishing of liquors to third persons, and not the use thereof by the saloon-keeper.
3. — : — INJURIES BY SALOON-KEEPER WHILE INTOXICATED: LIABILITY OF SURETIES FOR DAMAGES. S., a saloon-keeper, while intoxicated in his own saloon, shot and killed the plaintiff's husband. *Held*, That the drinking of the liquor by S. was not the traffic in intoxicating liquor within the meaning of the law, or such as will render his sureties liable in an action upon his bond.
4. **Error Proceedings: PARTIES IN SUPREME COURT.** The second point of the syllabus in this case in 29 Neb., 612, overruled.

REHEARING of case reported in 29 Neb., 612.

P. O. Cassidy, E. M. Wolfe, B. S. Baker, and W. P. Freeman, for plaintiffs in error.

John Saxon and Hambel & Heasty, contra.

Post, J.

On a former hearing of this case it was held that the court did not acquire jurisdiction to review the judgment below, for the reason that the defendants therein were not all made parties to the proceeding in error. (See *Curtin v. Atkinson*, 29 Neb., 612.) By reference to the record in the case, we observe that the petition in error was filed in this court on the 28th day of June, 1889. On the 30th day of

36	110
42	785
43	888
36	110
45	821
36	110
46	108
36	110
47	170
36	110
50	794
51	144
51	278
54	800
36	110
56	477
36	110
59	800

August, following, the plaintiffs in error's brief was served upon the attorney for the defendant in error. On the 16th day of September, 1889, defendant in error filed herein a paper entitled "An answer to the petition in error." On the 31st day of October, 1889, defendant in error filed a brief upon the merits of the case, and on the same day it was argued and submitted upon its merits. If the answer to the petition in error presents an issue of law it was never called to the attention of the court otherwise than by the submission of the case upon its merits. It is also claimed by counsel, and undisputed by the record, that they had no notice whatever of the answer aforesaid previous to the filing of the opinion herein, at the January, 1890, term. It may be conceded here that had objection been made at the proper time, on the ground that the parties to the judgment had not all been joined as plaintiffs or defendants in error, such omission would have been held fatal to the prosecution of the petition in error. A rehearing was subsequently allowed upon motion of plaintiffs in error. Since, then, the identical question has been carefully considered in the case of *Consaul v. Sheldon*, 35 Neb., 247, and the conclusion reached that where parties to a proceeding in error submit the controversy upon its merits, they will be held to have waived the objection that there is a defect of parties. We regard that case as decisive of the question now under consideration. There is, however, a more substantial objection to the proposition for which the defendant in error contends. A careful examination of the so-called answer satisfies us that it was not intended as an objection to the proceeding, on the ground of a defect of parties, but rather upon the ground that the plaintiffs in error, sureties upon the bond, were concluded by the judgment against their principal. We copy the pleading at length, as follows:

"And now comes the defendant in error, and for answer to the petition in error of said plaintiffs says, that said

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plaintiffs ought not to have their said action thereof against her, because the said plaintiffs were the sureties upon the license bond of one Patrick H. Shiel, and said Shiel is not joined with said plaintiffs in prosecuting this petition in error. Defendant further says that said bond was and is an obligation on the part of said plaintiffs in error to become responsible for the result of litigation against the said Shiel, to-wit, an obligation to pay and become responsible for all damages adjudged against said Shiel under the provisions of chapter 50, Statutes of Nebraska. And defendant avers that said Shiel having, without fraud or collusion with defendant, acquiesced in, and submitted to, said judgment against him, plaintiffs have no standing to maintain their said action and petition in error against her, but that said judgment is conclusive against said plaintiffs, and they ought not be heard to question said judgment in any manner or form whatever.

"This defendant, for further answer and defense, avers that the several matters and things specified in plaintiffs' petition in error do not constitute error to the prejudice of the said plaintiffs, or their legal rights as sureties upon said bond after judgment thereon against their principal, said Patrick H. Shiel. Wherefore defendant prays that said judgment may be affirmed and that she may have and recover her costs herein expended."

Had the pleader omitted all after the first sentence, it is possible that the pleadings might have been construed as an objection in the nature of a demurrer on the ground of a defect of parties. But construing all the several parts thereof together, it is obvious that the objection is not on account of the omission of Shiel as a party, but rather to the right of plaintiffs in error to maintain the action. In other words, it involves the merits of the controversy instead of the question of parties. Had defendant in error sought to avail herself of the failure to make Shiel a party to the petition in error, she should have called the attention

of the court to the omission before submission of the case on its merits.

2. We come now to a consideration of the controversy upon its merits. Several propositions are discussed by counsel, but they are mainly subsidiary to the one controlling question, viz.: Does the petition below state a cause of action against the plaintiffs in error? It is in substance alleged therein that Shiel was a licensed saloon-keeper and had given bond as required by law with plaintiffs in error as sureties. That during the time for which he was licensed to sell liquors said Shiel drank liquor to excess and finally, during a fit of intoxication in his saloon, shot and killed the plaintiff's husband. By reference to section 6, chapter 50, Comp. Stats., it will be observed that every licensed saloon-keeper is required to give a bond with at least two sufficient sureties, conditioned that he will not violate any of the provisions of the act, and will pay all damages, fines, penalties, and forfeitures which may be adjudged against him under the provisions of the act, and that said bond may be sued on for the use of any person who may be injured by the selling or giving away of intoxicating liquor by the person licensed.

By section 15 it is provided that "the person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic, he shall support all paupers, widows, and orphans, and the expense of all civil and criminal prosecutions growing out of or justly attributable to his traffic in intoxicating drinks, said damage to be recovered in any court of competent jurisdiction in an action on the bond required in section 6 of the act," etc.

By section 16 it is provided as follows: "It shall be lawful for any married woman, or any other person at her request, to institute and maintain in her own name a suit on any such bond for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children.

By section 17 it is provided, in substance, that when any one has become a public charge by reason of the selling or giving to him of intoxicating liquors, the city or county interested may recover in an action on the bond of the saloon-keeper guilty of selling or giving liquor to such person. By section 18 it is provided as follows:

"On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold or gave liquor to the person so intoxicated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman, or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification."

The contention of the defendant in error is that the term traffic as used in sections 15 and 16 should be construed to mean calling, occupation, or employment, and that the injury for which she sues is the result direct or remote of such occupation or employment. The policy of this court has been to give to the civil damage feature of our liquor law the most liberal construction possible in favor of innocent sufferers from the effect of the liquor traffic. For instance, in *McClay v. Worrall*, 18 Neb., 44, it was held that the injured party is not limited to such damages as are the natural and proximate result of the furnishing of the liquor, but that a woman may recover from a saloon-keeper for injuries inflicted upon her son by a third party in consequence of liquor furnished the latter. In *Wardell v. McConnell*, 23 Neb., 152 it was held that the

liability of the surety does not terminate with the bond, but where the principal furnishes liquor to one who is thereby disqualified to earn a support for his family, the liability of the surety continues throughout such period of disqualification. And in *Buckmaster v. McElroy*, 20 Neb., 557, it was held that one who had suffered injury in consequence of his own voluntary intoxication may recover on the bond of the saloon-keeper from whom the liquor was procured. We are not disposed to recede from the position taken in previous decisions, notwithstanding the last named case has been the subject of no little criticism, particularly by Mr. Black in his recent work on *Intoxicating Liquors*, 291. But to further extend the liability of the saloon-keeper would be a palpable misconstruction of the liquor law and an unmistakable encroachment upon the powers of the legislature. By a closer examination of section 15, which is relied upon as authority for the action, we notice that the saloon-keeper is required to pay all damages that the community or individuals may suffer in consequence of *such* traffic, evidently referring to the selling or giving away of liquors as provided in the preceding sections. The word "traffic" is defined by Bouvier thus: "Commerce, trade, sale, or exchange; or merchandise, bills, money, and the like." Webster defines it thus: "Commerce, either by barter or by buying and selling; trade. This word, like *trade*, comprehends every species of dealing in the exchange or passing of goods or merchandise from hand to hand for an equivalent, unless the business of retailing may be excepted. It signifies appropriately foreign trade, but is not limited to that." We find the definition in the Century dictionary substantially the same as the last above. One of the most familiar rules of construction is that words are to be taken in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the framers of the instrument, or would lead to some other inconvenience or absurdity. (Sedgwick on Const.

[2d ed.], 220.) The above rule is especially applicable to actions against sureties whose liability will never be held to extend beyond the precise term of their contract. (*Ludlow v. Simond*, 2 Caines' Cases [N. Y.], 1; *Walsh v. Bailie*, 10 Johns. [N. Y.], 180; *Lanuse v. Barker*, Id., 312; *Pennoyer v. Watson*, 16 Id., 100; *Tunison v. Cramer*, 5 N. J. L., 499; *Gates v. McKee*, 13 N. Y., 232; *Ward v. Stahl*, 81 Id., 406; *National Mechanics' Banking Ass'n v. Conkling*, 90 Id., 116; *State v. Medary*, 17 O., 554.)

The argument of the defendant in error, that the word traffic should be construed to mean the calling or occupation of the saloon-keeper appears on first impression to be quite plausible; but a more careful examination of the question has convinced us that it is not sound. The plaintiffs in error, by the conditions in their bond, undertook to answer for all damage which the community or individuals might suffer by reason of the traffic of their principal in intoxicating liquors. They are presumed to have had in view all the damage incident to the sale or furnishing of liquor to third persons. But they had a right to interpret and rely upon the language of the statute according to its ordinary and grammatical sense. They did not undertake that Sheil would not drink liquor, and the use thereof by him was in no sense a breach of the conditions of the bond, and if they must respond in this case why should their liability be limited to acts done by their principal while intoxicated? And why are they not liable for every assault and battery committed by him, at least upon the premises occupied as a saloon? We have found no case directly in point, yet authorities are not wanting which sustain the position of the plaintiffs in error. In *Lueken v. People*, 3 Ill. App., 375, which was an action upon a saloon-keeper's bond, the bartender of L., the saloon-keeper, sold liquor to B., whereby the latter became intoxicated and became engaged in an altercation with the bartender, who threw a glass tumbler at B., but missed him

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and struck the plaintiff, a by-stander. It was held that he could not recover. The obligation which those plaintiffs assumed was to answer for damages incident to the traffic in intoxicating liquors by their principal, that is the selling or furnishing of liquor to others and not the use thereof himself. It follows that the judgment against the plaintiffs in error is wrong and should be

REVERSED.

THE other judges concur.

A. H. BOWMAN, SHERIFF, ET AL. V. FIRST NATIONAL
BANK OF NELSON.

FILED JANUARY 18, 1893. No. 4194.

Executions: LIEN OF LEVY ON PERSONALTY: REPLEVIN: LIABILITY OF SHERIFFS. A sheriff levied an execution upon a quantity of personal property as belonging to one H., the judgment debtor. A portion of this property was taken under an order of replevin in favor of the wife of H. She gave a bond and the property was delivered to her. Afterwards, on the trial of the cause, judgment was rendered against her, whereupon she returned the property to the officer. He thereupon levied an execution in favor of another party on a part of said property and sold the same and applied the proceeds in satisfaction of said execution. *Held*, That the lien of the first execution was not divested and that the officer was liable to the first execution creditor.

ERROR from the district court of Nuckolls county.
Tried below before MORRIS, J.

W. A. Bergstresser, for plaintiffs in error.

S. A. Searle, contra.

MAXWELL, CH J.

This action was brought by the defendant in error against the plaintiff in error and the sureties on his official bond for levying a second execution upon property of a judgment debtor upon which the plaintiff in error had previously levied an execution in favor of the defendant in error, by reason of which the plaintiff in error sold the property under the second execution and applied the proceeds of said sale in satisfaction thereof, whereby the defendant in error suffered loss. On the trial of the cause in the court below the defendant in error recovered. The only question presented to this court is the sufficiency of the petition.

The petition shows the corporate existence of the bank; the election, qualification, and bond of Mr. Bowman; "that on the 12th day of April, 1887, the defendant in error recovered two judgments against one H. H. Speer in the county court of Nuckolls county, one for \$858.50 and the other for \$814.50 and costs; that on the 11th of January, 1888, executions were issued on these judgments and delivered to a deputy of the defendant, who levied the same upon a large amount of property (describing it) of one H. H. Speer; that afterwards, on the 24th of the same month and before the day of sale of said property under said executions a portion of the property (describing it) was taken under an order of replevin in an action by Eva A. Speer as her own property; that she executed a bond in said cause, which was duly approved and the property delivered to her. That on said 10th day of February, 1888, the county judge of said county, issued out of said court at the request of the plaintiff herein, two certain orders of sale, upon said judgments, directed to the defendant A. H. Bowman, sheriff of said Nuckolls county, commanding him that the said personal property, so levied upon by him in behalf of said plaintiff as the property of H. H. Speer (describ-

ing the property) which remains unsold, that he come at the same as soon as possible and expose to sale, to satisfy said judgments hereinbefore referred to, giving amounts of each in each order of sale; in the one, however, naming the increase costs \$67.95 and reciting payment thereon in the sum of \$22.85, which orders of sale were in due form, ordering the sheriff to pay the money so made to the party entitled thereto, and making each returnable in thirty days from said 10th day of February, A. D. 1888, which orders of sale were then and there delivered to said defendant.

"11. That said replevin suit of Eva A. Speer then pending in said court was continued on the return day to the first day of the February term of said court, and then set for trial in said court on the 17th day of February, A. D. 1888.

"12. That on the 27th day of January, A. D. 1888, the firm of Crawford & Hutchinson caused an execution to be issued out of the district court of Nuckolls county, Nebraska, in a cause and upon a judgment rendered in said district court, wherein said Crawford & Hutchinson were plaintiffs and the said H. H. Speer was defendant, directed to the sheriff of said county, the defendant herein, and on same day delivered to him for service, which execution was against the said H. H. Speer alone, and not against Eva A. Speer.

"13. That said defendant sheriff thereupon wrongfully levied the said execution in favor of Crawford & Hutchinson, upon a large portion of the said property so replevied by the said Eva A. Speer from said defendant's deputy as aforesaid, and so held by said Eva A. Speer under her replevin bond pending the trial of said replevin cause, which was at that time still pending and undetermined, and among other property so by the defendant wrongfully levied upon was the twenty-four head of cattle hereinbefore specifically enumerated and described; the said defendant sheriff then and there knowing, and having due notice of the plaintiffs'

rights in the premises and their said prior levy, and then and there having in his possession their said order of sale with instructions from the plaintiffs herein to levy and collect the same, on said property, so soon as, and in case of determination of said replevin suits should be had in favor of said sheriff, who justified his rights in said replevin suit under and by virtue of the said first execution so held by him and levied in favor of the plaintiffs herein.

"14. That said replevin suit of Eva A. Speer was tried in said county court on February 17th and 18th, the jury bringing in their verdict on February 19th, on which was rendered a judgment in due form, awarding to defendant therein who justified as aforesaid under plaintiffs' executions, a return of said property (including the cattle herein-after described with other property) and in case a return could not be had, that he recover the value of his possession of same in the sum of \$1,037.66 and that defendant recover his costs therein expended, taxed at \$110.35, the plaintiffs herein furnishing counsel and every assistance in their power to and for said officer, defendant in the trial of said cause.

"15. That the defendant having advertised said property so by him wrongfully levied upon as aforesaid, on the 27th day of January, 1888, for sale under said execution of Crawford & Hutchinson on February 20, at 10 o'clock A. M., the jury in said replevin cause having found against Eva A. Speer, and a judgment having been thereon ordered in due form before said sale was had, the said Eva A. Speer demanded of said defendant sheriff that he receive said property in satisfaction of said replevin judgment and then and there forbid his selling said property, or any of it, that had been in controversy in said replevin suit under said execution, in favor of Crawford & Hutchinson, which notice and tender and demand of said Eva A. Speer was made upon the said defendant before the opening of said sale on the morning of the 20th day of February, 1888.

"16. That said plaintiffs by their attorney, on said 20th day of February, A. D. 1888, notified said sheriff that said plaintiffs claimed the right to have said cattle and other property so by him levied upon under their said executions and orders of sale in favor of said First National Bank, and forbid his selling said property that had been involved in said replevin suit (and which was then and there turned over to said defendant sheriff, or attempted to be so returned to him) under said execution in favor of Crawford & Hutchinson against said Eva A. Speer, and then and there demanded of said defendant that he advertise and sell the whole of said property so in controversy under their said two executions and orders of sale.

"17. That said defendant, in violation of his duty and obligation to plaintiffs herein, refused to receive said property under plaintiffs' executions and orders of sale issued on their said judgments hereinbefore mentioned, but proceeded to sell, and did sell, the following goods, chattels, and property, to-wit: one white cow, one horn broken; one white last spring's calf; one red heifer, three years old past; one yellowish cow; one red and white cow, one horn broken; one red and white heifer; one yearling calf; one red heifer, three years old; one red cow, some white in face; one red and white cow; one red heifer, coming two years old; one red heifer calf; one red and white spotted heifer; one red and white steer calf; one red cow; one red and white cow; one roan cow; one spotted steer calf, with white face; one spotted steer calf, with white face; one red and white heifer calf; one spotted cow; one roan cow; one white steer calf, and one red steer calf, being twenty-four head of cattle in all, and of the value of \$600, which said cattle were a portion of the cattle so by said sheriff levied upon under plaintiffs' executions and which said cattle were also included in the number of cattle so by said Eva A. Speer replevied from the defendant sheriff, the right to the possession of which

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were found and adjudicated to be in the defendant sheriff, he claiming them under said plaintiffs' executions and by the said Eva A. Speer attempted to be returned to the said defendant sheriff, which said cattle the defendant wrongfully sold under said executions in favor of said Crawford & Hutchinson on said 20th day of February, A. D. 1888, and paid the proceeds of said sale into the district court of said county, which proceeds have since been paid to said Crawford & Hutchinson, by reason of which said wrongful sale by said sheriff plaintiffs' lien upon and right to have it sold under plaintiffs' executions and orders of sale has been lost and said property has been scattered and placed out of the reach of said plaintiffs and the proceeds thereof cannot be applied to the payment of plaintiffs' debt, to plaintiffs' damage.

"18. That the said H. H. Speer is wholly insolvent and has no property, either real or personal, out of which said plaintiffs can collect their debt and judgments.

"19. That no part of plaintiffs' debt and judgments hereinbefore described has been collected and paid, except the sum of \$315.24, which was the amount realized from the sale of the balance of said personal property so returned by Eva A. Speer to said defendant sheriff (except one herd pony and said twenty-four head of cattle), which last named sale was had by said defendant under plaintiffs' orders of sale hereinbefore described, on the 5th day of March, A. D. 1888, the proceeds of which sale were \$406.72, and the additional costs were \$46.38 in addition to the \$67.95 increase costs hereinbefore named and set forth.

"20. That the said replevin suit of Eva A. Speer is fully settled and determined, and that she, or her bondsmen for her, have paid the costs adjudged against her as aforesaid.

"21. That said defendant A. H. Bowman did not faithfully perform the duties of his said office as required by law, and has wholly failed to perform the same as hereinbefore

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set forth, to the plaintiffs' damage in the premises in the sum of \$600, together with interest thereon from the 5th day of March, A. D. 1888.

"Wherefore said plaintiffs pray judgment against said defendants for said sum of \$600 and interest thereon from the 5th day of March, A. D. 1888, and for costs of suit."

It will thus be seen that the defendants in error had acquired a lien on the property in controversy by the levy thereon. A sale under this levy was suspended by the action in replevin, but was not divested. The property is shown to have belonged to H. H. Speer, and, so far as appears, was liable to be taken for the payment of these debts. This being so it was the duty of the officer to have sold the property under the writs of *venditioni exponas*, and as he failed to do so, but sold it under a second execution and applied the proceeds to the satisfaction thereof, he is liable. A case somewhat similar to this was decided by the supreme court of Iowa (*Cox v. Currier*, 62 Ia., 551), and it was held to be the duty of the officer to sell the property under the levy. It is very clear that the petition states a cause of action and there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

KANSAS MANUFACTURING COMPANY v. O. H. LUMRY
ET AL.

FILED JANUARY 18, 1893. No. 4663.

Guaranty: EVIDENCE: REVIEW. The questions of fact were submitted to the jury upon the various phases of the proof, and there is no error in the record.

ERROR from the district court of Nance county. Tried below before MARSHALL, J.

Lamb, Ricketts & Wilson, for plaintiff in error.

Meiklejohn & Thompson, contra.

MAXWELL, CH. J.

This action was brought in the district court of Nance county to recover from the defendants the sum of \$100, with interest from the 15th day of January, 1887, the action being based on the guarantee by the defendants in error of the payment of a certain promissory note, executed by one J. A. Johnson, of the date of January 1, 1887. The defense is based on the alleged fact that the note was given for the purchase of a certain wagon by Johnson from the plaintiff. That the plaintiff warranted the wagon as follows:

"We warrant all of the spring wagons of our manufacture for the period of one year from the date of their purchase as follows: That they are well made in every part and of good material; that their strength is sufficient, with fair and reasonable usage, to carry as stated in this catalogue, and for breakage or failure on account of poor workmanship, or defect in material, we agree to make good all reasonable charges in the following manner: We will either furnish the broken or defective part at our factory or nearest agency, or we will pay for the new parts at the price stated in our price list of repairs, less the trade discount. No claim will be considered under this warranty unless the same be presented to us within one year from the purchase of the wagon.

"KANSAS MANUFACTURING COMPANY."

The evidence shows the sale, the warranty, and the defect, and that the plaintiff was notified, and to remedy the

defect had forwarded a new axle and a new wheel, which failed to remedy the defect when applied; that the sale was made about the 13th of August, 1886; that the defendants procured the return of the wagon to their place of business about the 15th of November, 1888, and thereafter shipped it to the plaintiff at Leavenworth, Kansas; that the plaintiff refused to receive it, and brought suit on the guaranty. The case was tried at the March, 1890, term of the district court, and resulted in a judgment against the plaintiff for costs. One Jackson, an employe of the defendants in error, testifies in effect that one Townsend, the general agent of the plaintiff, in November, 1888, instructed him to notify the defendants to return the wagon to the plaintiff, and he gave the notice as requested, and the wagon was thereupon returned. Townsend denies that he instructed Jackson to so inform the defendants, but that he gave him the following:

“FULLERTON, NEB., 11-15, 1888.

“MS. LUMRY BROS.: I wish you would ship the spring wagon wheel and axle back to our factory, — ship via U. P. Ry., and mark B-L ‘For repairs.’ That will entitle us to $\frac{1}{2}$ rate. Please ship as soon as possible and oblige,
Truly yours, C. TOWNSEND.”

It seems to be admitted by Jackson that he received the written notice, but he testifies that he received the oral instructions as well; that he communicated the same to the defendants and they acted upon them and returned the wagon to the plaintiff. This testimony was proper to submit to the jury, and the instructions seem to conform to the various phases of the proof; and the jury having found against the plaintiff, it is difficult to see upon what ground the verdict can be set aside.

AFFIRMED.

THE other judges concur.

SAMUEL B. GERBER, APPELLEE, v. B. F. JONES ET AL.,
APPELLANTS.

FILED JANUARY 18, 1893. No. 4339.

1. **Review.** Upon the main issues in the pleadings the findings and judgment are sustained by the evidence.
2. **Accounting: PARTNERSHIP.** There is an error of computation in favor of the plaintiff, of the sum of \$413, to be deducted from the decree.
3. ———: ———: **FINDINGS.** No account is taken in the decree of the value of the property conveyed by Coates to the plaintiff, which is claimed by the defendant to be of the value of \$8,000, and admitted by the plaintiff to be of the value of \$2,000. *Held*, That the plaintiff within thirty days may reconvey the property, or in case of failure to do so, a reference will be ordered to ascertain the value and report the same to the court, and upon the approval of the report final judgment will be entered in this court.

APPEAL from the district court of Box Butte county.
Heard below before KINKAID, J.

G. M. Lambertson, C. W. Gilman, W. H. Westover,
and *A. L. Field*, for appellants.

Thomas Darnall, James H. Danskin, and John P.
Arnot, *contra*.

MAXWELL, CH. J.

On or about the 1st day of May, 1887, the plaintiff entered into an agreement in writing with the defendants to form a partnership to engage in the business of banking, of which Samuel B. Gerber was to be president, E. A. Coates cashier, and B. F. Jones assistant cashier. The plaintiff was to furnish \$3,300 as present capital, and the name of the bank was to be the Farmers & Traders Bank of Hemingford, Box Butte county, Nebraska. The

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defendants were to transact the business of the institution and furnish the building free of rent, and the profits and losses were to be equally divided between the plaintiff and the defendants. The agreement was to remain in force for the period of two years; that the defendants exercise control of the business from the 1st day of May, 1887, to the 22d day of February, 1888; that according to his agreement plaintiff paid to the copartnership, at the commencement of the business, \$3,300, and subsequently between the 4th day of June, 1887, and the 4th day of February following, paid to the copartnership the further sum of \$6,143.67; that the defendants paid no money into the business; that the defendants from time to time withdrew from the business and applied to their own use large sums of money, greatly in excess of what they were entitled to receive under the agreement, the total amount of which is the sum of \$8,643.67; that the plaintiff discovered this fact about the 22d day of February, 1888, and demanded from the defendants the payment of said sum of \$8,643.67, which they refused to pay. The plaintiff prays that the defendants be enjoined from interfering or intermeddling with the business and property of the copartnership, and be enjoined from disposing of any of their properties and effects until the further order of the court; that the copartnership be dissolved, and that an account may be taken of the moneys received by the plaintiff and the defendants during the existence of the copartnership, and that the plaintiff may have judgment against the defendants, and each of them, for the amount found due him from them, and for such other relief as in equity he is entitled to.

The defendant B. F. Jones, for answer, 1st, admits the formation of the partnership; 2d, denies each and every other allegation contained in the petition; 3d, alleges that on the 5th day of November, 1887, said partnership ceased by mutual agreement and consent, the said B. F. Jones retiring from the firm; that at said last mentioned date a full settlement

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was had of the partnership affairs, and the said Jones released from further liability; 4th, that since his retirement the business has been conducted by the plaintiff and the defendant Coates in a very careless and negligent manner, so much so that the money and other assets of the copartnership might have been lost, abstracted, or stolen; that the plaintiff has withdrawn at various times large sums of money, for which he has not accounted. Wherefore he prays the dismissal of the action.

The reply to this answer is, in effect, a general denial.

The defendant Coates, in his amended answer, admits the formation of the partnership, but denies each and every other allegation contained in the petition; alleges that an accounting and settlement of partnership affairs was had on the 5th day of November, 1887; that the plaintiff Samuel B. Gerber had access to and control of the partnership business after the 5th day of May, 1887, and took exclusive possession of the same after the 1st day of February, 1888; that the plaintiff appropriated large sums of money from time to time to his own use out of the partnership assets; that the business of the firm was conducted in a very careless and negligent manner after plaintiff took exclusive possession of the same, so that the money of the copartnership could have been abstracted or taken by other persons; that on or about the 2d day of April, 1888, he, Coates, was induced by the plaintiff and his attorneys, by the use of undue influence, to convey to said Gerber certain pieces and parcels of land of the value of \$8,030.60, to be held in trust until the settlement of partnership accounts in controversy; that said Samuel B. Gerber has disposed of the same, or part thereof, for his own use and benefit; that all of the above described property was conveyed without any consideration whatever. The defendant therefore prays that the said Samuel B. Gerber be enjoined from disposing of the above described property and that the same be reconveyed to him, the said defendant, or

in lieu thereof, that this defendant recover judgment against the plaintiff for the value of said property, in the sum of \$8,030.60, and such other relief as in equity and justice he may be entitled to.

For a reply to the answer of the defendant Coates, plaintiff denies that upon the 5th day of November, or at any other time, an accounting and settlement was had of partnership affairs; 2d, denies that he had access to or control over the partnership business between May 5th, 1887, and the 22d of February, 1888; 3d, denies that any undue influence was used by the plaintiff or his attorney to induce the defendant Coates to convey the land therein described to the plaintiff, but avers the fact to be that said lands were conveyed to him in trust, pending the settlement of the bank difficulty, and that said property was by agreement to be applied to reimburse the plaintiff for the loss sustained by the shortage in said bank, occasioned by the fault, negligence, and misapplication of the funds of said bank, all of which was the property of the plaintiff, by the defendants Coates and Jones, so far as said property might go to accomplish the purpose of liquidating the loss and damage sustained by the plaintiff thereby; denies that the property so as aforesaid conveyed by the defendant Coates was of the value alleged in the answer, or of any greater value than \$2,000.

On the trial of the cause the court found as follows:

"First—That plaintiff and defendants entered into the agreement as alleged in said petition; that plaintiff furnished for the use of said copartnership, from the 1st day of May, 1887, to the 22d day of February, 1888, the sum of \$13,037, to be used in said banking business by said copartnership; that plaintiff withdrew from said copartnership for his own use the sum of \$3,700, and no more.

"Second—The court further finds that by the terms of said agreement the defendants jointly and severally agreed to conduct, manage, and control the business of said co-

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partnership and account to the plaintiff for the money contributed by him to the said copartnership.

"Third—The court further finds that the defendants, nor either of them, ever contributed any money or property to the copartnership.

"Fourth—The court further finds that the plaintiff, under and by virtue of said agreement and the evidence, was under no obligation to participate in the management or control of said copartnership in any manner, and the court further finds that the plaintiff did not in fact participate in the management or control of said copartnership business from May 1st, 1887, until the 22d of February, 1888.

"Fifth—The court further finds that there was no dissolution of said copartnership on November 5th, 1887, as alleged in the answers of defendants, and further that there was no accounting had on said 5th day of November, 1887, nor at any other time, but that said copartnership still existed without any accounting from the 1st day of May, 1887, until the 22d day of February, 1888.

"Sixth—The court therefore finds there is due plaintiff from defendants, and each of them, the sum of \$9,750. It is therefore considered by the court that the partnership heretofore existing between Samuel D. Gerber, the plaintiff, and E. A. Coates and F. B. Jones, defendants, be and is hereby dissolved, and that the plaintiff recover of and against the defendants, and each of them, jointly and severally, the sum of \$9,750, and the costs of this action, taxed at —.

The principal matters involved in the case are upon disputed questions of fact. The testimony tends to show that the defendants conducted the bank in a very careless and inefficient manner, and that they used considerable sums of money in the payment of their own debts. There is no doubt the very large shortage in the case was due to this appropriation or their neglect or wrong. The findings of the court therefore will not be disturbed. There are

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some errors in the decree which we will now proceed to point out and correct.

The court finds that the plaintiff put into the firm \$13,037 and drew out \$3,700, which deducted from the sum first named leaves \$9,337, instead of \$9,750. The judgment therefore will be modified as above indicated.

The defendant Coates conveyed to the plaintiff a considerable amount of property claimed by Coates to be of the value of over \$8,000, and by the plaintiff admitted to be of the value of \$2,000. We find no value affixed to this property or deduction made therefor. This property must be reconveyed or a deduction made for the value thereof. This value the parties may agree upon if able to do so, or the court will refer the matter to ascertain the value. The judgment of the court below is therefore modified in respect to these matters, and in regard to all other matters is affirmed. The plaintiff may reconvey the property to Coates within thirty days, or in case he fails to do so the cause will be referred to — to take testimony and find the value of the property conveyed, and upon the approval of his report, final judgment will be entered in this court.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LILLIE LEIGH, ADMINISTRATRIX, V. OMAHA STREET
RAILWAY COMPANY.

36	131
48	812
36	131
49	782

FILED JANUARY 18, 1893. No. 4875.

- 1. Master and Servant: PERSONAL INJURIES: DEFECTIVE APPLIANCES: NEGLIGENCE.** It is the duty of a master to furnish his servants with such appliances for his work as are suitable and may be used with safety, and if the servant is injured by

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reason of defective appliances furnished by his master, the latter will be liable for damages unless he can show that he has used due care in the selection of the same.

2. ———: ———: ———: ———: EVIDENCE: QUESTION FOR JURY.

The driver of a street car propelled by horses was given a span of horses to propel the car, one of which was a broncho and would kick when struck, which fact was known to the master but of which the driver was not aware and was not informed by the master. The car was under the care of a conductor, who permitted the same to be overcrowded, every available foot of space, both in the car and on the platform, being filled. On attempting to start the car the broncho refused to pull, whereupon the driver, who was crowded close to the broncho, slapped it with the lines, when it kicked him in the abdomen, causing death in a few hours. *Held*, That there was sufficient testimony to submit the questions of fact to a jury.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

Cowin & McHugh for plaintiff in error.

John L. Webster and *Breckenridge, Breckenridge & Crofoot*, *contra*.

MAXWELL, CH. J.

This is an action to recover for the death of Elmer Leigh, the husband of the plaintiff. The testimony tends to show that on the 5th of September, 1889, the county fair of Douglas county was in progress at North Omaha; that one of the means of transportation to the fair grounds was by way of the cable cars running north on Twentieth street to Lake street; that from that point to the fair grounds the defendant operated a stub line of road, with street cars drawn by horses, the passengers being transferred to the horse cars from the cable cars; that Elmer Leigh was driver of one of the cars on the stub line; that he had been in the employ of the company about three weeks; that one of the horses he was furnished with was a bron-

cho, which the company had owned for some four years; that this animal was gentle in the barn, but when hitched up and struck with a line or whip would kick; that Leigh had never driven the horse until that day, and, so far as appears, did not know of the horse's peculiarities or failings. There is testimony tending to show that this fault was known to the company. The testimony also tends to show that on the day named there was a conductor on the car to collect fares, and that the car was crowded so that every available inch of space within the car and on the platforms was occupied by passengers, and the driver forced by the pressure of the crowd close to the broncho; that the car stopped on the corner of Twentieth and Spence streets to take on another passenger, when the conductor gave the signal to start. This Leigh attempted to do, but the broncho refused to pull, whereupon he slapped it with the lines on the back. The broncho thereupon still refused to pull, but crowded against the other horse and kicked Leigh on the abdomen, of which soon afterwards he died. There is proof of the right of the plaintiff to bring action, the loss sustained by her, and that Leigh's death was caused by the kick. At the conclusion of the plaintiff's testimony, the court, on motion of defendant, granted a nonsuit and dismissed the action. In *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583, Judge REESE very clearly states the rule as follows: "If the evidence so introduced tends in any degree to sustain the allegations of the plaintiff's petition, the action of the court in summarily dismissing the action will be deemed prejudicial to the plaintiff, and a new trial will be ordered." The testimony clearly shows the relation of employe and employer between Leigh and the defendant. This being so, it is a fundamental rule of law that the master is to furnish his servant with such appliances for his work as are suitable and may be used with safety, and if the servant is injured by reason of defective appliances placed in his hands by the master, or his agent, the master will

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be liable, unless he can clearly show that he has used due care in the selection of the same. (*Weems v. Mathiewson*, 4 McQueens [Eng.], 215; *Feltham v. England*, 36 L. J., Q. B. [Eng.], 14; *Warner v. Erie R. Co.*, 39 N. Y., 468; *Hugh v. Texas & P. Ry. Co.*, 100 U. S., 213; *Wabash Ry. Co. v. McDaniels*, 107 Id., 454-459; *Chicago & N. W. R. Co. v. Sweet*, 45 Ill., 202; *Noyes v. Smith*, 28 Vt., 59; *Northcoate v. Bachelder*, 111 Mass., 322; *Camp Point Mfg. Co. v. Ballou*, 71 Ill., 418; *Kranz v. White*, 8 Bradwell [Ill. App. Ct.], 583.) Now here was an animal which would kick on being struck, and the owner knew it, yet he delivered it to Leigh on the street car, to drive, without informing him of the fault. It is the duty of such driver to stand on the front platform, close to the horses. In effect, a defective, and under some circumstances dangerous, appliance in the propelling power of the car was used. The fact that it was an animal instead of a steam-engine, can make no difference. It was the duty of the defendant to furnish the deceased with a safe team, or inform him of its bad or vicious habits, so that he could guard against them. There is some testimony that the car was overloaded, through the fault of the conductor, and that was one of the causes which contributed to the death of the driver. Upon the whole case it is apparent that there was sufficient evidence to submit to the jury and the court erred in taking it from them. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CITY OF OMAHA V. MARK HANSEN.

FILED JANUARY 18, 1893. No. 3960.

36	135
40	393
36	135
55	140

1. **Eminent Domain: PUBLIC IMPROVEMENTS: DAMAGES: INSTRUCTIONS.** Where rented property is injured by a public improvement it is proper on an inquiry of the damages to inquire to what extent, if any, the improvement will affect the rental value. This is merely an element of damage for the jury to consider, keeping in view the fact that the measure of damages is the difference between the value of the property immediately before and immediately after the construction of the same and disregarding public benefits.
2. Instructions taken as a whole state the law correctly.

ERROR from the district court of Douglas county. Tried below before DOANE J.

A. J. Poppleton, for plaintiff in error.

Hall, McCulloch & English, contra.

MAXWELL, CH. J.

The defendant is the owner of the lot on the southeast corner of Jones and Eleventh streets in the city of Omaha, on which, at the time of the trial, he had three buildings, one being a two-story brick on Eleventh street, one a two story frame fronting on Eleventh street, and a cottage on the back part of the lot. The plaintiff constructed a viaduct on Eleventh street over the railway tracks which extends past the plaintiff's lot, being at that point more than thirty feet above the surface of the lot. The viaduct extends along Eleventh street from the south line of Jackson street to near Mason street, being about 1,000 feet in length. This is an appeal from the award of damages. On the trial of the cause in the district court the jury returned a verdict in favor of Hansen for the sum of \$2,300, upon which judgment was rendered.

The city relies upon three errors to secure a reversal of the case. These will be noticed in their order.

"First—That the court erred in permitting the witness, M. R. Risdon, to be asked the following question: 'Q. What in your opinion is the effect of loss of rental value of the property caused by the building of the viaduct, taking into consideration the various damages that you have stated as caused by the viaduct?' To which he answered as follows: 'A. That is a difficult question for me to answer, for the reason I cannot determine whether I could rent it at all or not. I should think it would depreciate it from 50 per cent any way—you might not be able to rent it at all; I haven't any means of determining that.'"

The objection is to the first part of the question, but it will be seen that the witness was unable to answer, and, therefore, no injury resulted. The question, however, would seem to be proper. While it is true that the measure of damages is the difference in value of the property with the improvement and without it, excluding general benefits, yet the value is to be ascertained from considering all the uses to which the property may be applied, and the rental value is one item that may or may not influence the jury. It is true property has a value in most cases even if it cannot be rented. This property, however, in all probability, can be rented, and it was proper to inquire if the structure in question diminished the rental value thereof. The objection therefore is overruled.

Second—The second objection is to the testimony of William Fitch, on the ground that he had not shown himself competent to answer the question. It is sufficient answer to say that the attorney is mistaken when he makes the statement, as it does appear that he had a sufficient knowledge of the value of real estate to testify in the case. The objection is therefore overruled.

Third—The third assignment is error in giving par-

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agraphs 1, 2, 3, 4, 5, and 6, of the instructions, which are as follows:

"1. The jury are instructed that the fact that other persons having property in the vicinity of the viaduct have waived claim of damages for its construction is not material to the question of plaintiff's damages, and should not be considered by them in this case.

"2. The jury are instructed that in considering the question of damages they may consider any consequential damages caused by the construction of the viaduct to the property of the plaintiff. Modified by inserting after the word 'caused,' in the second line, the word 'directly.'

"3. The jury are instructed that the general increase of travel upon the Eleventh street viaduct, and on Eleventh street at each end of the viaduct, common to all that street caused by the erection of the viaduct, if they find it to exist, is not a special benefit to, nor could such be deducted from any damages found to be sustained by plaintiff.

"4. The jury are instructed that if they believe any witness is interested in the result of this case, or is prejudiced or biased in respect thereto, they are at liberty to consider the interest, prejudice, or bias as affecting the credibility and weight of the witness' testimony.

"5. The jury are instructed that if they believe that any witness has made threats with reference to plaintiff's recovery, or that plaintiff should not recover for damages against the city, they are at liberty to consider that fact as affecting such witness' credibility.

"6. The jury are instructed that in considering the testimony of any witness, they are at liberty to consider his official position, if any, towards the city of Omaha, and any interest he may have, if any, adverse to plaintiff's recovery."

The particular objection is to the third. The instruction must be considered with reference to the testimony on that point. That showed the viaduct to be over thirty feet

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above Hansen's lot. Just what particular benefit he could receive from the increased travel up near the roofs of his houses does not appear. It is very clear that, as applied to the testimony in the case, it was not erroneous. It is very evident that the verdict is not excessive and that there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

36	138
43	229
36	138
58	617

R. H. HENRY, EXECUTOR, v. JAMES VLIET ET AL.

FILED JANUARY 18, 1893. No. 3634.

1. **Sales: FRAUD OF PURCHASER: RESCISSION.** Where goods were sold to be paid for on delivery, either in cash or secured note payable in thirty days, but the purchaser fraudulently managed to obtain possession of the property without complying with the conditions, the purchaser was insolvent and mortgaged the property in question to secure pre-existing debts, *held*, that the seller, upon discovery of the fraud, could rescind the sale and reclaim the goods from the mortgagee.
2. The first clause of the syllabus in *Henry v. Vliet*, 33 Neb., 130, overruled.

REHEARING of case reported in 33 Neb., 130.

Cornish & Robertson, for plaintiff in error.

Hall & McCulloch, *contra*.

MAXWELL, CH. J.

This is an action of replevin to recover the possession of 60 barrels of 74 gasoline, 750 cases 100 flash oil, 300 cases $\frac{1}{2}$ 150 W. W. oil of great value. The answer of the

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defendant below (plaintiff in error) was a general denial. On the trial of the cause the jury returned a verdict in favor of the defendants in error for the property in dispute and "that the defendant is indebted to the plaintiff in the sum of \$757.52 for goods not found." Judgment was rendered on the verdict. The substantial facts in the case are as follows:

One L. A. Stewart, doing business in Omaha as L. A. Stewart & Co., during the months of April, May, June and July, 1887, seems to have purchased goods from every one who would sell to him on credit. He seems to have had but little property and less integrity. Early in July of that year he purchased from the plaintiff below four car loads of oil, which were to be paid for in cash on delivery or by a secured note or draft accepted by some bank. Upon the arrival of the property he managed to obtain possession of the same without either paying the cash or giving secured note. He thereupon executed a chattel mortgage on the same, together with other property, to Henry to secure the payment of one note for \$5,000, dated April 30, 1887, due ninety days from the date thereof; one note for \$5,000, dated June 10, 1887, due in ninety days from the date thereof; one note for \$2,500, dated June 25, 1887, due in ninety days from the date thereof; and one note for \$2,500, dated June 22, 1887, due in ninety days from the date thereof; and also three certain drafts drawn by L. A. Stewart & Co., on W. R. Stewart, of Des Moines, Iowa, in the aggregate sum of \$4,957.50. The notes described in said mortgage (with the exception of one for \$2,500, dated June 25, 1887) were renewals of prior indebtedness, \$10,000, which was first loaned January 2, 1886. The bills of exchange secured by said chattel mortgage consisted of one draft drawn July 19, 1887, upon Will R. Stewart, Jr., of Des Moines, Iowa, for \$850; one draft for \$2,617.50, dated July 20, 1887, upon Will R. Stewart, Jr.; one draft upon W. R. Stewart, Jr., for

\$1,490, dated July 21, 1887, all of which said drafts were protested for non-acceptance; said drafts were deposited in the Bank of Omaha, of which Andrew Henry was the sole owner, and received as cash, and L. A. Stewart & Co. were allowed to draw against them as so much cash on deposit.

At the time of the giving of said mortgage, there was in the Bank of Omaha, to the credit of L. A. Stewart & Co., the sum of \$274.50. The notes secured by said mortgage were all signed by L. A. Stewart & Co., and also by W. R. Stewart, Jr. It had been the custom of W. R. Stewart, Jr., to honor the drafts of L. A. Stewart & Co. upon him. It also appears that on July 20, 1887, W. R. Stewart, Jr., of Des Moines, Iowa, accompanied by his attorney, Mr. Dudley, came to Omaha and insisted upon L. A. Stewart & Co. securing the indebtedness to the Bank of Omaha, upon which W. R. Stewart, Jr., was liable as surety. A mortgage was thereupon prepared by L. A. Stewart & Co., conveying the stock of goods and accounts of the said L. A. Stewart & Co., including the goods in controversy in this action, and W. R. Morris, attorney for L. A. Stewart & Co., W. R. Stewart, Jr., and his attorney, Mr. Dudley, on the morning of the 22d of July, 1887, presented the same to Henry, and demanded that in consideration of the entire indebtedness to said Andrew Henry being secured, the said Andrew Henry should release the said W. R. Stewart, Jr., from liability by reason of said notes. The mortgage was thereupon received by Henry. There is a conflict of testimony on this point. The evidence of W. R. Morris and W. R. Stewart, Jr., being that said W. R. Stewart, Jr., was absolutely released from his liability upon said notes; and the testimony of Edward J. Cornish was that Andrew Henry agreed, as part consideration of said mortgage, not to press W. R. Stewart, Jr., upon the notes or to bring suit, or in any manner to make claim for payment upon the notes until the mort-

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gaged property should be entirely exhausted, and this we are convinced is the truth in regard to the transaction. W. R. Stewart, Jr., therefore, is still liable on those obligations.

It is unnecessary for us to review the various assignments of error at length. The conceded facts show that the property in question was sold for cash on receipt, or secured notes; that Stewart obtained the property without paying for it; that he soon afterwards executed the mortgage in question; that Henry knew, or had the means of knowing, that the property in question had not been paid for, and in no sense is he a *bona fide* purchaser. The same is true of W. R. Stewart, Jr. As against these parties, therefore, the owner of the goods had a right to reclaim them.

Some reflections are made upon the plaintiff in error in defendant in error's brief, but there is no ground for such insinuations, as he seems to have done nothing inconsistent with fairness and integrity, but the claims of the defendant in error are superior to his. It follows that the judgment is right and that the opinion in this case on the former hearing, which is reported in 33 Neb., 130, should be overruled. The judgment of the district court is

AFFIRMED.

THE other judges concur.

WILLIAM F. HOLLINGSWORTH V. SAUNDERS COUNTY.

FILED JANUARY 18, 1893. No. 4387.

1. **Negligence: DEFECTIVE BRIDGES: DAMAGES: LIABILITY OF COUNTY.** Where a county board negligently fails to keep a public bridge in suitable repair so as to be in a safe condition

36	141
43	609
36	141
50	542
53	757

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for travel, and damages have been occasioned by reason thereof, under the act of the legislature of 1889, the county is liable therefor to the person sustaining the damages, unless he has been guilty of contributory negligence.

2. ———: ———: ———: ———: PRESENTATION OF CLAIM TO COUNTY BOARD. The person sustaining the damages may maintain an original action against the county whose duty it was to keep the bridge in repair. He is not required to present his claim for damages to the county board for allowance or rejection, since the provisions of section 37, chapter 18, Compiled Statutes, do not apply to demands arising upon torts.

ERROR from the district court of Saunders county.
Tried below before MARSHALL, J.

George I. Wright, for plaintiff in error.

B. F. Hines and *G. W. Simpson*, *contra*.

NORVAL, J.

This action was brought by the plaintiff in error against the county, alleging in his petition:

“First—That the defendant is a county duly organized under and by virtue of the laws of the state of Nebraska, and is not under township organization.

“Second—That on and for some time prior to the 15th of August, 1889, a certain bridge on, and belonging to, and forming a part of the public road which lies and runs north and south between sections 32 and 33, in township 14, range 8, in Wahoo precinct, in said county of Saunders, and state of Nebraska, which road was a public road and highway, and was much traveled and used by the citizens of said county and by the public generally, was out of repair and dangerous to the public travel, and one of the main posts which supported the said bridge was gone from under it, and the approach to the bridge from the north side thereof had been washed away in such manner as to become and be in a dangerous condition, and that at the

said time the said condition of the said approach was covered up by planks so as not to be observable to a person traveling in a wagon, and that the said bridge was, at said time, and for some time prior thereto had been, dangerous to pass over with ordinary loads or travel, of all of which the defendant had due notice.

"Third—That on the 15th day of August, 1889, and for some time prior thereto, said bridge was allowed to be and remain exposed to public travel, without guards or notice to prevent the public from passing or traveling over the same.

"Fourth—That during the afternoon of the 15th day of August, 1889, this plaintiff, with his said team of horses, attached to a lumber wagon, loaded with fifty bushels of oats therein, was passing along the said public road from the south going north, and the plaintiff drove his team upon the said bridge, intending to cross the same, but, while lawfully traveling on said road and bridge, and accidentally and without fault on his part, because of the said post being gone from under the said bridge and the condition of said bridge, this plaintiff, his team, harness, wagon, and oats were precipitated from the said bridge to the ground and water under the said bridge.

"Fifth—That by reason of the premises the plaintiff was damaged in the sum of \$400 to his horses, wagon, harness, and oats.

"Sixth—That this plaintiff was not familiar with said road, he not having passed over it for many months preceding the time of the injury complained of herein.

"Seventh—That the defendant had the means of knowledge of the condition of said bridge at the said time, and had failed to repair the same, after having had a reasonable time to do so, and that the damages to plaintiff's property was caused by the said bridge not being in sufficient repair, the said bridge being one which the said defendant was liable to keep in repair.

"Wherefore the plaintiff prays for judgment for \$400 and costs."

The district court sustained a general demurrer to the petition and dismissed the action.

In *Woods v. Colfax County*, 10 Neb., 552, it was decided that neither at common law, nor under the statutes of this state as then existing, was a county liable for damages occasioned by the negligence of the county board in failing to keep a public bridge in suitable repair and safe condition for travel. It is perfectly plain that a county is not liable for the acts or negligence of its officers unless made so by legislative enactment. The question, therefore, presented by the record before us is, whether or not, under the statute in force at the time of the injury complained of, is a county liable for damages sustained by an individual in consequence of its failure to keep in safe repair a public bridge.

The legislature of 1889 enacted a law which took effect July 1, 1889, entitled "An act relating to highways and bridges, and liabilities of counties for not keeping the same in repair." (Laws 1889, chap. 7; Compiled Statutes 1891, p. 733.) By section 4 of said act it is provided that "if special damage happens to any person, his team, carriage, or other property, by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs of the same, and damages and costs shall be paid by the counties in proportion as they are liable for the repairs; *Provided, however*, That such action is commenced within thirty (30) days of the time of said injury or damage occurring."

The language employed by the legislature in the section

quoted is clear and explicit, and leaves no room for judicial interpretation. It is clear that in case a county board negligently fails to keep a highway or public bridge in suitable repair, so as to be in a safe condition for travel, and damages have been occasioned by reason thereof, the county is liable therefor, at the suit of the party injured, unless the plaintiff has been guilty of contributory negligence.

It is finally urged that the demurrer was rightfully sustained for the reason that the plaintiff failed to present to the county board a claim for damages. The county attorney contends that the district court has not original jurisdiction of a case like this, but that plaintiff should have presented his claim for damages to the board of county commissioners for their allowance or rejection, under section 37, chapter 18, Compiled Statutes, 1889, which provides that "Before any claim against a county is audited and allowed, the claimant, or his agent, shall verify the same by his affidavit, stating that the several items therein mentioned are just and true, and the services charged therein, or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount claimed is due and unpaid, after allowing just credits. All claims against a county must be filed with the county clerk. And when the claim of any person against a county is disallowed, in whole or in part, by the county board, such person may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the county clerk, within twenty days after making such decision, and executing a bond to such county with sufficient security, to be approved by the county clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant. Upon the disallowance of any claim, it shall be the duty of the county clerk to notify the claimant, his agent or attorney, in writing of the

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fact, within five days after such disallowance. Notice mailed within said time shall be deemed sufficient."

This section has been frequently considered by this court, and in an unbroken line of decisions it has been held substantially that an original suit on an account or claim against a county cannot be maintained, but that the remedy by appeal from the decision of the county board is exclusive. (*Brown v. Otoe Co.*, 6 Neb., 111; *Clark v. Dayton*, Id., 192; *State, ex rel. Clark, v. Buffalo Co.*, Id., 454; *Dixon Co. v. Barnes*, 13 Id., 294; *Richardson Co. v. Hull*, 24 Id., 536.) These cases are to the effect that the statute applies to claims or demands arising upon contracts. They do not sustain the doctrine contended for by the county attorney, that unliquidated demands against counties for damages arising, as in this case, from a tort must be presented to the board for its audit and allowance under the provisions of said section 37. True, it is stated in the opinion in *Richardson Co. v. Hull*, 24 Neb., 542, that "the language of either statute seems sufficient to confer the power on the county board to hear and determine the claim or demand of a citizen against the county of whatever nature, under contract or by tort." That was not a suit for damages, but one to recover from the county moneys which had been paid by Hull as taxes upon lands owned by him which were not subject to taxation. The amount of his claim was liquidated. It is obvious that the above quotation from the opinion already mentioned is merely *obiter dicta*. This being an action for unliquidated damages, does not fall within the purview of said section 37, therefore it was not indispensable to the right of the plaintiff to maintain his suit that he should have presented his claim to the county board. (*Nance v. Falls City*, 16 Neb., 85; *Village of Ponca v. Crawford*, 18 Id., 555.) The Falls City case was an action brought in the district court by the administrator of George L. Nance to recover damages from the city for negligently causing the death of his intestate. The law

relating to cities of the second class contained a provision to the effect that all claims must be presented to the city council for allowance or rejection, to entitle a person to recover costs. It was decided that the word "claim" refers only to claims arising upon contract, and not upon tort. This decision was followed with approval in the later case of the *Village of Ponca v. Crawford, supra*.

Again, we conclude that the statute of 1889, which imposed a liability upon counties for damages resulting from the failure to keep roads and bridges in repair, authorized the bringing an original suit in any court of competent jurisdiction to recover such damages. It will be noticed that section 4 of the act provides that "the person sustaining the damage may recover in a case against the county," and further, the action can be brought against all of the counties, etc. It also requires that the *action* shall be brought within thirty days after the injury or damage occurs. It is plain to be seen that the legislature contemplated the bringing of a suit in a court of law, and that the person sustaining damages should not be required to present his claim to the county board.

We are forced to the conclusion that the petition states a cause of action and that the court below erred in sustaining the demurrer thereto and dismissing the action. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with the law.

REVERSED AND REMANDED.

THE other judges concur.

36	148
43	47
36	148
44	213
36	148
50	575
50	787
36	148
56	454

**EMMA H. ROSE V. C. C. MUNFORD, APPELLANT, IM-
PLEADED WITH WHITFIELD SANFORD, APPELLEE,
ET AL.**

FILED JANUARY 18, 1893. No. 4537.

1. **Usury.** An agreement to pay annually in advance the highest legal rate of interest for the use of money, does not make the contract usurious.
2. ———: **COUPON NOTES: INTEREST.** Where a party loans money at the maximum rate allowed by statute and coupon notes are taken for the interest, which stipulate that interest shall be allowed thereon after maturity, at ten per cent, the contract is not thereby tainted with the vice of usury. In such case no interest will be allowed on such coupons.
3. ———: **PLEADING: EVIDENCE.** *Held,* That the answer does not allege sufficient facts to constitute a plea of usury, and that the evidence fails to prove that the contract was usurious.

APPEAL from the district court of Saunders county.
Heard below before Post, J.

S. H. Sornborger, for appellant.

H. Gilkeson and J. R. Gilkeson, contra.

NORVAL, J.

This action was brought by Emma H. Rose to foreclose a mortgage executed by C. C. Munford and wife. To the suit Whitfield Sanford, W. H. Dickinson, and others were made parties defendant. Sanford filed an answer and cross-petition, setting up his mortgage on the premises given by the Munfords, and Dickinson likewise filed an answer and cross-petition, setting up his mortgage made by the same parties. To the cross-petition of Dickinson, Munford answered, pleading duress. To Sanford's cross-petition Munford filed an answer which, after admitting

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the execution of the notes and mortgage, alleges "that all of the consideration of any kind that this defendant received or had from any person or persons whomsoever, for the said notes and mortgage, was the sum of \$641.15, paid by the said Sanford to one N. H. Bell on or about March 27, 1885, for the defendant, and the further sum of \$358.85, paid by the said Sanford to W. H. Dickinson on or about March 27, 1885, for this defendant; that this defendant received no other or further sums of money from the said Sanford (than those above) for the said notes and mortgage; that at the time the said money was paid for this defendant, as aforesaid, this defendant owed to one Charles W. Sanford, the son of said defendant W. Sanford, a small sum on a promissory note dated January 9, 1884, due in ninety days, given for \$168, with ten per cent interest from maturity thereof, which said promissory note had indorsed thereon the following, to-wit, 'Paid interest to date and \$68 principal April 19, 1884,' a portion of said promissory note being usury, but the exact amount thereof is unknown to this defendant; that at the time of the payment of said money as aforesaid in March, 1885, the said Sanford, defendant, turned over said note to the aforesaid N. H. Bell, who still holds the same, but as to whether the said Sanford considers he had paid or released the said note is to this defendant unknown, but if the said Sanford did pay the said note, the total amount of consideration received by this defendant for the said note and mortgage to said Sanford given does not exceed at the most the sum of \$1,100, and interest at ten per cent per annum on \$100 from April 19, 1884, to the date of said note and mortgage, January 1, 1885, or less than \$1,107.50 in all; that this defendant has received no other or further consideration for the said notes and mortgage than as stated."

Sanford for reply denies every allegation in said Munford's answer contained.

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At the trial the court below found the issues in Sanford's favor, and gave him a first lien on the mortgaged property, and also as between Munford and Dickinson, in favor of the latter. A decree was rendered foreclosing all the mortgages. Munford appeals from the findings and decree entered in favor of Sanford.

The first contention of appellant is that the contract entered into between Munford and Sanford is usurious upon its face. The mortgage was given to secure a principal note for \$1,186.85, bearing date January 1, 1885, due ten years from date with ten per cent interest after maturity thereof, and nine interest coupon notes, each for the sum of \$118.68; one due and payable on the first day of January, 1886, and one maturing on the first day of January of each year thereafter, each bearing interest at the rate of ten per centum from maturity. There was also another note for \$118.68, due January 1, 1886, drawing ten per cent interest from date until paid. This last note was given for the first year's interest. It will be noticed that the interest coupons were so drawn as to require the borrower to pay interest annually in advance. It is urged that this makes the contract usurious, since the interest stipulated for is the maximum rate allowed by law.

Section 1, chapter 44, Compiled Statutes, declares that "any rate of interest which may be agreed upon, not exceeding ten dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action; which rate of interest so agreed upon may be taken yearly, or for any shorter period, or in advance, if so expressly agreed."

The construction placed upon the above provision by counsel for appellant is that when the loan is for a longer period than a year at the highest rate, the interest may be taken annually, but not in advance. In other words, interest can be lawfully taken in advance only when the contract is to be performed within a year. We do not yield

assent to such interpretation. The words used by the legislature have no such meaning. The statute provides that when it is so agreed interest "may be taken yearly, or for a shorter period, or in advance." The right to stipulate that the borrower shall pay interest in advance does not depend upon the time the loan runs. To hold that it does, would be interpolating words into the statute. The agreement in this case to pay interest annually in advance does not taint the transaction with usury. (*Leonard v. Cox*, 10 Neb., 541; *McGill v. Ware*, 4 Scam. [Ill.], 21; *Goodrich v. Reynolds*, 31 Ill., 490; *Mitchell v. Lyman*, 77 Id., 525; *Hoyt v. Pawtucket Institution for Savings*, 110 Id., 390; *Telford v. Garrels*, 24 N. E. Rep. [Ill.], 573; *Manhattan Co. v. Osgood*, 15 Johnson [N. Y.], 162.)

It is the settled law of this state, when a party loans money at the highest legal rate, and coupon notes are taken for the interest, which stipulate that interest shall be allowed thereon after maturity at the maximum rate, that the contract is not thereby rendered usurious, but that no interest will be allowed on such coupons. (*Hayer v. Blake*, 16 Neb., 12; *Mathews v. Toogood*, 23 Id., 536, 25 Id., 99; *Richardson v. Campbell*, 27 Id., 644.)

We agree with appellee that the answer does not allege sufficient facts to constitute the defense of usury. To make a contract usurious there must be an agreement between the borrower and lender by which the latter receives or reserves a greater rate of interest than the law allows. There must be an intent on the part of the borrower to give and of the lender to receive interest in excess of the legal limit. (*Leonard v. Cox*, 10 Neb., 541; *New England Co. v. Sanford*, 16 Id., 689.)

Testing the answer by the above rule the pleading is clearly insufficient. The facts alleged therein do not show that the contract was usurious, nor can it be inferred from the facts stated that there was an intent to evade the law on the subject of usury. It fails to aver the rate of in-

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terest agreed upon. True, the answer sets up the amount of money received by Munford on the loan, but it does not state that the difference between the amount so received and the face of the note was intentionally retained by Sanford as interest, nor can any such a conclusion be properly drawn from the facts alleged. As was said by the present chief justice in his opinion in the *New England Co. v. Sanford*, *supra*: "The proof cannot make a stronger defense than the answer in the case. It is, therefore, essential in pleading usury to state with whom the usurious agreement was made, its nature, and the amount of usurious interest agreed upon or received. The court will not presume that the parties intended to evade the law, but there must be an allegation to that effect." (*Anglo-American L. M. & A. Co. v. Brohman*, 33 Neb., 409.)

The defense of usury is not made out by the evidence. Appellant insists that he only borrowed \$1,000, and that the difference between that sum and the face of the note was reserved at the time by C. W. Sanford, the son and agent of appellee, as a bonus. This the appellee denies. It is undisputed that of the sum borrowed, \$358.85 were paid by appellant's directions to W. H. Dickinson, and the further sum of \$641.15 was likewise by Munford's orders paid to N. H. Bell, to apply on a note and mortgage given by Munford to Mrs. Rose. The money was borrowed for the purpose of making these payments, and appellant admits that \$1,000 of the money was so applied. It is also conceded that appellant was indebted to said C. W. Sanford on a promissory note calling for \$168 and interest, on which had been paid \$68 and interest to April 19, 1884. There is in the record evidence tending to establish that said C. W. Sanford also held a \$30 note against appellant, and that both of these notes were paid out of the loan made by appellee to Munford. C. W. Sanford testified that he was paid out of the money borrowed \$186.85 in satisfaction of these two notes. From

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the evidence we think that it is more than probable that these two notes held by C. W. Sanford were usurious. It is evident that more than the statutory rate of interest must have been computed on these notes to have amounted to \$186.85. But the fact that usurious interest was charged on these notes does not taint the transaction between Munford and Whitfield Sanford with the vice of usury. The two transactions were entirely separate and distinct.

Lastly, it is insisted that the contract is usurious because the money was not paid over until some time after January 1, 1885, the date of the note, and from which time interest began to run on the loan. It appears that the understanding between the parties was that Sanford was to make the loan and furnish the money on the 1st day of January, 1885, and by Munford's directions the papers were drawn up and dated that day. The loan was not closed at that time for the reason that the mortgages of W. H. Dickinson and Mrs. Rose on the property had not been released of record. The agreement when the loan was negotiated was that Sanford should have the first lien on the premises. The Dickinson mortgage was not released until January 12, on which date \$358.85 were advanced on the loan. The Rose mortgage was not released until March 28, when the balance of the money was paid by Sanford. There is no foundation in the evidence for the charge that the notes and mortgage given to Sanford were dated back or that the money was withheld by Sanford for the purpose of obtaining a higher rate of interest than the statute permits. That the money was not paid earlier was the entire fault of appellant in not sooner procuring releases of prior incumbrances. The defense of usury is not established. There being no error in the record the judgment of the court below is

AFFIRMED.

MAXWELL, CH. J., concurs.

POST, J., having presided in the court below, did not sit.

C. P. HENDERSON ET AL. V. SAMUEL NOTT.

FILED JANUARY 18, 1893. No. 4755.

1. **Exemptions: CONTRACTORS: LABOREERS.** A person who contracts to furnish all help and make and burn brick for a certain price per thousand, and also agrees to keep the machinery furnished by the other party in good repair, to supply oil for the same, and feed and care for the team furnished by the other party, is not entitled to the benefits of section 531 of the Code, which declares that "nothing in this chapter shall be so construed as to exempt any property in this state from execution or attachment for clerks', laborers', or mechanics' wages," etc.
- 2 ———: ———: ———. The purpose of the legislature in enacting said provision was to secure to every person belonging to either of the classes therein specifically enumerated a compensation for his own personal services. Persons who contract for and furnish the labor and services of others, whether with or without their own services, for a stipulated price for the joint labor of all, are not entitled to the benefit of the statute.

ERROR from the district court of Hamilton county.
Tried below before BATES, J.

Abbott & Caldwell, for plaintiffs in error.

NORVAL, J.

The defendant in error commenced an action in the county court against the plaintiffs in error upon six different causes of action. The first cause of action alleged in the petition is on an account stated between the parties for work and labor performed by plaintiff for defendants, amounting to \$106.28. The second cause of action is for three days' work at \$1.50 per day. The third count of the petition is in the sum of \$10 for work performed for defendants in moving a kiln of brick. The fourth count is for the sum of \$40 for services rendered in erecting for defendants a brick wall for a brick kiln. The fifth cause

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of action is for a balance of \$5.75 alleged to be due plaintiff for providing feed, stabling, care, and attention for two horses belonging to defendants. The sixth count is to recover the sum of \$328 upon a written contract, of which the following is a copy:

"This agreement, made between C. P. Henderson and J. B. Henderson, partners under the firm name of C. P. Henderson & Bro., brick makers of Phillips, Hamilton county, Nebraska, party of the first part, and Samuel Nott, now of the same county, party of the second part, to-wit: Party of second part agrees to furnish and pay all help and make and burn good merchantable brick for three (\$3) per thousand; to keep all machinery in good repair; in case of breakage in any part of the machinery not to the fault of party of the second part, then the party of the first part to replace the same; the party of the first part to furnish one team of horses, and the party of the second part to feed and keep the same in good order. To furnish and keep machinery well oiled. It is also agreed that party of the first part is to furnish all coal on cars at Phillips to burn all brick made by party of the second part.

"Grand Island, July 22, '90.

"C. P. HENDERSON.

"J. B. HENDERSON.

"SAMUEL NOTT.

"Witness:

"M. L. DOLAN.

"J. T. NOTT."

The defendants in their answer, after admitting certain of the allegations of the petition and denying others, pleaded a counter-claim against the plaintiff, amounting to \$267.55. On the trial the county court found there was due on the first, second, third, and sixth causes of action from the defendants \$429.70; that nothing was due on the fourth and fifth causes of action; that there was due from plaintiff to defendants the sum of \$144.88; and judgment was ren-

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dered in favor of the plaintiff for \$288.82, the difference between said sums, as laborers' wages, together with cost of suit. The defendants below prosecuted error to the district court, the error complained of there, as well as here, being the rendition of a judgment for laborers' wages. The judgment of the county court was affirmed.

The evidence in the case was not preserved by a bill of exceptions. The only question, therefore, presented is whether, under the petition, Nott was entitled to a judgment for laborers' wages for the amount rendered. It will be perceived that the total amount claimed in the first three causes of action stated in the petition is only \$120.70, so that a portion of plaintiff's recovery must have been based upon his sixth cause of action. Under the contract set up in said count of the petition, and copied above, was defendant in error entitled to a judgment for laborers' wages for the amount due thereunder? The argument of counsel for plaintiffs in error against the right of Nott to such a judgment is briefly this: That a wage laborer, in contemplation of the statute, is one who depends upon his daily labor for sustenance; that the mere fact that manual labor enters into and forms a part of the consideration of a contract does not of itself entitle the party to a wage laborer's judgment; that one who employs others, and uses machinery to carry on the work, or contracts for undertakings which involve the employment of other persons, machinery, and materials, is not a wage laborer. The determination of the question involved in this case calls for a construction of section 531 of the Code of Civil Procedure, which declares that "nothing in this chapter shall be so construed as to exempt any property in this state from execution or attachment for clerks', laborers', or mechanics' wages, for money due and owing by any attorney at law for money or other valuable consideration received by said attorney for any person or persons," etc.

Under the above provision no property of a debtor is exempt from levy and sale on execution or attachment on a debt for the wages of a laborer, mechanic, or clerk. It is not claimed that the indebtedness to Nott under the contract already mentioned was for services performed by him for plaintiffs in error, either as a clerk or mechanic, but both the county and district courts ruled that the debt was for laborers' wages; so that if defendant in error is entitled to the benefit of the statute it is because what was done by him in pursuance of the contract was as a laborer in the sense contemplated by the above provision. The purpose of the legislature in enacting the section was to give protection to the classes mentioned therein. It was designed to furnish relief to the persons specifically enumerated in the collection of debts due them for their personal services, and not to those who contract and furnish the labor and services of others. Such a contractor is not a laborer within the meaning of the provision, nor is he entitled to its protection. Plaintiff below is not a laborer in the popular sense or the common understanding of that word. The term "laborer," in the sense of this statute is one who is hired to do manual or menial labor for another, but it does not include every person who performs labor for compensation. The authorities fully sustain the proposition.

In *Brookway v. Innes*, 39 Mich., 47, it was decided that an assistant civil engineer of a railroad company is not a "laborer within the meaning of a constitutional provision making stockholders of a corporation liable for labor debts of the corporation." And in *Jones v. Avery*, 50 Mich., 326, it was held that a traveling salesman, selling by sample, did not come within the meaning of the same constitutional provision. To the same effect is *Price v. Kirk*, 90 Pa. St., 47.

In *Wildner v. Ferguson*, 43 N. W. Rep. [Minn.], 794, it was ruled that an agent who sells goods by sample, driv-

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ing about for that purpose, with his own horse and buggy, receiving a weekly salary, is not within the purview of a statute which exempts the "wages of any laboring man or woman in any sum not exceeding fifty dollars, due for services rendered by him or them and during ninety days preceding the issue of process," etc.

In re Ho King, 14 Fed. Rep., 724, it was held that a theatrical actor is not a laborer within the popular sense in which the term is used, and that the word does not include any person but those whose occupation involves physical toil and who work for wages.

We do not think the indebtedness of plaintiff in error arising under the contract we are considering, is laborers' wages in the sense in which that word is ordinarily and in our statute used. By the contract, Nott agreed to manufacture for plaintiffs in error good merchantable brick, for which they were to pay him a certain price per thousand. He was to hire the laborers and pay them their wages, keep the machinery in repair, feed the team furnished by the Hendersons, and furnish the oil for the machinery. Nott was a contractor, and not a laborer in the common acceptation of the term, therefore he does not come within either the words or spirit of the statute, and is not entitled to its benefits.

The decisions already cited and those in *Aikin v. Wasson*, 24 N. Y., 482; *Coffin v. Reynolds*, 37 Id., 640; *Balch v. New York & O. M. R. Co.*, 46 Id., 521; *Wakefield v. Fargo*, 90 Id., 213; *Groves v. Kan. City, St. J. & C. B. R. Co.*, 57 Mo., 304; *Mann v. Burt*, 35 Kan., 10, in principle sustain this conclusion.

In *Balch v. New York & O. M. R. Co.* the head-note states the decision as follows: "The words 'laborers' and 'labor,' as used in the general railroad act of 1850, which gives a laborer a claim against the company for the indebtedness of a contractor in certain cases, and to a limited amount, are used in their ordinary and usual senses, and imply the

personal services and work of the individual designed to be protected. The former does not include one who contracts for and furnishes the labor and services of others, or who contracts for and furnishes a team or teams, whether with or without his own services."

In *Aikin v. Wasson*, under an act making stockholders in a corporation liable for debts due its laborers and servants for service performed for the corporation, it was held that a contractor for the construction of a portion of the company's road was neither a laborer nor servant.

Mann v. Burt, *supra*, was an action against a contractor and railroad company for labor performed by the plaintiff for the contractor upon the road under a statute which makes a railroad company liable for the debts of the contractor to "laborers, mechanics, and material-men, and persons who supply such contractor with provisions or goods of any kind," when the railroad company fails to take from the contractor engaged in the construction of its road a good and sufficient bond. The railroad company, as one defense alleged in its answer, in substance, that the persons for whose services the suit was brought were employed by the contractors in the capacity of foremen, clerks, time keepers, and teamsters in connection with their terms. Plaintiff demurred to the defense, which was overruled by the trial court, and which ruling was assigned for error in the supreme court. The court in the syllabus say: "Where a teamster and his team are employed by the contractor for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the railroad company is not chargeable." (See *Atcherson v. Troy & Boston R. Co.*, 6 Abb. Pr. Rep., n. s. [N. Y.], 329.)

It follows from the views that we have expressed and the decisions referred to that the judgment of the county

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court and that of the district court should be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

38	160
45	6
38	160
44	421
38	160
53	104
53	328
53	439

MILO HODGKINS ET AL. V. STATE OF NEBRASKA.

FILED JANUARY 18, 1893. No. 4462.

1. **Indictment and Information.** It is not necessary in an information or indictment to use the precise words of the statute. It is sufficient if the words used are identical in meaning with those used in the statute.
2. **Assault and Battery: INFORMATION.** In an information for assault and battery it was alleged that the defendants "did willfully and maliciously make an assault upon * * * and did then and there unlawfully strike, beat, and wound, etc." *Held*, Sufficient.
3. ———: ———: **VERIFICATION: OBJECTION: WAIVER.** Objection to an information on the ground that it was verified before a notary public instead of a magistrate should be made before going to trial, otherwise it will be held to have been waived.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Billingsley & Woodward and *Robert J. Greene*, for plaintiffs in error.

George H. Hastings, Attorney General, for the state.

POST, J.

The first question presented by the record in this case is the sufficiency of the information, which is here set out:

"In the District Court of Lancaster County, Nebraska.
The State of Nebraska, plaintiff, v. Hodgkins and
Frank Trumble, defendants.

"STATE OF NEBRASKA, } ss.
LANCASTER COUNTY. }

"John W. Mussetter, being first duly sworn, on his oath complains that the defendants, Milo Hodgkins and Frank Trumble, for that said Milo Hodgkins and Frank Trumble, at the county of Lancaster and state of Nebraska, on the 13th day of March, 1890, in and upon the bodies of Marshal Stein and O. W. McAllister did then and there willfully and maliciously make an assault upon, and them, the said Marshal Stein and the said O. W. McAllister, unlawfully did strike, beat, and wound, contrary to the statutes in such case made and provided, and against the peace and dignity of the state of Nebraska.

"JOHN W. MUSSETTER.

"Subscribed in my presence and sworn to before me
this 15th day of March, A. D. 1890.

"M. A. CAMERON,

"Notary Public."

By reference to section 17 of the Criminal Code, defining assault and battery, it will be observed that the language thereof is: "If any person shall *unlawfully* assault or threaten [another] in a menacing manner, or shall *unlawfully* strike or wound another, the person so offending shall, upon conviction thereof, be fined," etc. The language of the information is, "did willfully and maliciously make an assault upon * * * and unlawfully did strike, beat, and wound, contrary to the statute." The information is sufficient. It is not necessary in charging an offense to use the precise words of the statute. It is sufficient if words are used which are identical in meaning to those in the statute. (*Whitman v. State*, 17 Neb., 224.) The words willfully and maliciously are equivalent to the term unlawfully.

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It is argued that there is no valid information, for the reason that the charge upon which plaintiffs in error were tried was sworn to before a notary public. It has been held by this court, in *Richards v. State*, 22 Neb., 145, and *Davis v. State*, 31 Id., 247, that the information should be sworn to before some judicial officer. In the last above case, however, it was held that an objection to the information on that ground will be waived unless made before verdict. And Judge NORVAL, in the opinion of the court, uses the following language: "It (the objection) should have been raised by motion to quash before pleading to the information." This prosecution originated before the county judge of Lancaster county, with whom the above information was filed. Plaintiffs in error, having been convicted in that court, appealed to the district court. The first record we find of any objection to the information is after the jury had been sworn in the district court, where it appears they objected to any evidence being offered or received:

"1st. Because there is no legal presentment as required by the constitution and laws of the state.

"2d. The affidavit of plaintiff does not contain facts sufficient to constitute a criminal action.

"3d. There is no complaint filed in this case as required by law."

In the opinion of the writer the objection set out above should be held to apply only to the form of the information and the sufficiency of the allegations therein contained, and not to the want of a proper verification. But it is clear that the objection, even if sufficient, comes too late after a trial before the county judge upon the merits of the case, and after a jury had been selected and sworn in the district court. The provision for the verification of an information before a magistrate is surely not more imperative than the provision found in section 585 of the Criminal Code, that no information shall be filed against

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any person, except fugitives from justice, until such person shall have had a preliminary examination as provided by law. Yet it has been repeatedly held that by pleading not guilty and going to trial on the issue thus formed the accused waives his right to object on the ground that he has not had a preliminary examination. (*Cowan v. State*, 22 Neb., 519; *Washburn v. People*, 10 Mich., 383; *People v. Jones*, 24 Id., 215; *People v. Williams*, 53 N. W. Rep. [Mich.], 779.) It is evident that the plaintiffs in error are not now in a position to assert that the information was not legally verified. The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

AUGUSTUS GILCHRIST V. CITY OF SOUTH OMAHA.

FILED FEBRUARY 1, 1893. No. 4880.

Municipal Corporations: INJURY FROM DEFECTIVE STREETS:

NEGLIGENCE. One G., a non-resident, in passing from the Union Pacific depot in South Omaha to Twenty-third and P streets in said city, in the night season, went east on N street to Twenty-fourth street, then south on Twenty-fourth street nearly to O, when he noticed stairs about ten feet in height in front of a private residence. He ascended the stairs, which he mistook for those on a block near the point of his destination, and in continuing on towards his destination fell into the excavation caused by grading O street in said city, and was severely injured. *Held*, That the proof failed to show negligence on the part of the city.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

Gilchrist v. South Omaha.

Winfield S. Strawn, for plaintiff in error, cited: *Burnham v. Boston*, 10 Allen [Mass.], 290; *South Omaha v. Cunningham*, 31 Neb., 316; *Omaha v. Randolph*, 30 Id., 699; *Lincoln v. Walker*, 18 Id., 250; *Valparaiso v. Donovan*, 28 Id., 406; *Lincoln v. Smith*, 28 Id., 762.

Charles Offutt, *contra*, cited: *Rice v. Montpelier*, 19 Vt., 470; *Cassidy v. Stockbridge*, 21 Id., 319; *Sparhawk v. Salem*, 83 Mass., 30; *Scranton v. Hill*, 102 Pa. St., 378; *Skyes v. Pawlet*, 43 Vt., 446; *Wheeler v. Westport*, 30 Wis., 403; *Kellogg v. Northampton*, 4 Gray [Mass.], 65; *Smith v. Wendell*, 7 Cush. [Mass.], 498; *Howard v. North Bridgewater*, 16 Pick. [Mass.], 189; *Shepardson v. Cole-rain*, 13 Met. [Mass.], 55; *Goodin v. Des Moines*, 55 Ia., 67; *Blake v. Newfield*, 68 Me., 365; *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb., 306; *People v. Cook*, 8 N. Y., 67; *Kelsey v. Northern Light Oil Co.*, 45 Id., 509; *Neuendorf v. World Mutual Life Ins. Co.*, 69 Id., 389; *Baulec v. New York & H. Ry. Co.*, 59 Id., 356; *Toomey v. South Coast Ry. Co.*, 3 C. B. n. s. [Eng.], 146; *Hyatt v. Johnston*, 91 Pa. St., 200; *Ryder v. Wombwell*, L. R. 4 Exch. [Eng.], 39; *Schuylkill & Dauphin Improvement Co. v. Munson*, 14 Wall. [U. S.], 442; *Pleasants v. Fant*, 22 Id., 120; *Commissioners of Marion Co. v. Clark*, 94 U. S., 284; *Griggs v. Houston*, 104 Id., 553; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep., 159; *Bagley v. Bowe*, 105 N. Y., 179; *Bulger v. Rosa*, 119 Id., 460; *Longley v. Daley*, 46 N. W. Rep. [So. Dak.], 247.

MAXWELL, CH. J.

This is an action to recover for injuries sustained by the plaintiff by falling into the excavation of O and Twenty-fourth streets in the defendant city. Upon the conclusion of the testimony in the court below the court directed the jury to return a verdict for the defendant, which was done, and the action dismissed.

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It appears from the record that the plaintiff is a resident of Montgomery county, Iowa; that he had visited South Omaha in April, 1887; that his brother resided on the northwest corner of Twenty-third and P streets in said city; that the streets of said city are numbered from the east side of the city westward, No. 1 being the first street on the east; that the letters of the alphabet are used to designate the streets running east and west, the first street on the north side of the city being A street; that about 8 P. M. on the night of December 3, 1888, the plaintiff reached South Omaha over the Union Pacific railway. He was alone, and undertook to walk to his brother's residence. The night was dark. He followed N street east from the depot to Twenty-fourth street, then went south on Twenty-fourth street nearly to O. At this point he noticed stairs about ten feet in height, leading up from Twenty-fourth street, as graded, to the top of the bank. These stairs were in front of a private residence, and had been erected by the owner thereof to obtain access to his dwelling. The plaintiff, however, ascended the stairs and continued in the direction of his brother's residence, and fell over the perpendicular embankment, about fifteen feet in depth, caused by grading O street. The plaintiff was very severely injured, and if entitled to recover at all the amount claimed probably would not more than compensate him for his injuries. A number of witnesses testify that the plaintiff, soon after the injury, stated that he had mistaken the stairs; that he should have gone another block and then gone up certain stairs, which would have led to his brother's house. This testimony he does not deny.

We have carefully read both the pleadings and proof in this case, and fail to find any evidence of negligence on the part of the city. In *South Omaha v. Cunningham*, 31 Neb., 316, a trail or track, which had been in common use, ran along a deep excavation for a street, was left

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without protection or guard, in consequence of which the defendant in error fell into the excavation, and died of his injuries. The court held, and we think properly, that it was the duty of the city to erect barriers to obstruct this trail or way, and as it had failed to do so it was liable. But that case differs from this in its essential facts. It is very evident that the evidence fails to show a right of the plaintiff to recover against the defendant, and there is no error in the record. The judgment is therefore

AFFIRMED.

THE other judges concur.

**ARMOUR-CUDAHY PACKING COMPANY V. JOHN E.
HART.**

FILED FEBRUARY 1, 1893. No. 4424.

Master and Servant: JUSTIFICATION FOR DISCHARGE OF SERVANT BEFORE EXPIRATION OF TERM OF EMPLOYMENT: EVIDENCE. The plaintiff was employed for one year at a salary as superintendent and general manager of a large packing house, but was discharged before the expiration of the year. In an action to recover salary for the time after his discharge, *held*, that the proof showed such neglect of duty on his part as to justify his discharge.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

Cowin & McHugh, for plaintiff in error.

M. V. Gannon and Brogan, Tunnicliff & Perley, *contra*.

MAXWELL, CH. J.

About November 17, 1887, the defendant in error entered into the employment of the plaintiff in error as fore-

man and general manager for the plaintiff in error at South Omaha, such employment to continue for one year at a salary of \$2,500 per year. On the 28th of April, 1888, the defendant in error was notified by his employers that he would be discharged and to look out for other business. He was discharged early in June of that year but was paid up to July 1, 1888. This action is brought to recover for the remainder of the year. On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of \$833.33. The errors assigned are that the verdict is against the weight of evidence and error in giving and refusing certain instructions. The defendant in error testifies as to his duties as follows:

Q. What were your duties under your alleged employment with Mr. Cudahy; did you say what were your duties?

A. My duties, it was to oversee the working of the house; general foreman.

Q. Now, to oversee the whole business?

A. With the exception of the clerical part.

Q. What was that overseeing to consist of?

A. To see that the work was done properly.

Q. What work?

A. All the work of the house with the exception of the machinist department and the clerical department; that I had nothing to do with.

Q. Slaughtering?

A. Yes, sir.

Q. You oversaw that?

A. Yes, sir.

Q. And the curing?

A. Yes, sir.

Mr. Cudahy testifies in regard to his duties as follows:

A. He had full charge of our house—the general working of it; the conducting of our business generally through the house.

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Q. Now in detail, that would require him to do what?

A. That would require him to look after the killing, the cutting, the curing, the delivery of meats, the weights, and the business generally.

Q. Now, after he went to work, you may state in what manner he did his work from the first, and what conversations you had right along with him in regard to it.

A. Well, there were a great many things that appeared to me to be wrong.

Q. And that were wrong?

A. That were wrong.

By the court: It may stand if he goes on and specifies what was wrong.

* * * * *

Q. Just go right on and speak about his work wherein that was wrong.

A. One time in the winter that we first opened up here I came here from Chicago and found that our hogs, the Saturday's killing, on Sunday, were all froze, and that means a great loss in cutting.

Q. How should they be kept?

A. They should be kept in a temperature probably about twenty.

Q. Now, to what extent was this?

A. It was one day's killing.

Q. How much would that be?

A. About 2,500 hogs. And then another time——

Q. State what conversation you had with Hart about that.

A. Well, Hart was manager of the house, and I called him up and asked him why he let those hogs freeze, and why he did not put them in the chill room where they would not have frozen, and his reply—I do not remember what it was.

Q. What is the effect of that freezing?

A. The effect is that it would waste about twenty-five cents a hog, I think.

Q. Now state what else. Go on after that.

A. At another time after that he put all the hogs into the chill room while the weather was mild outside and closed the chill room up, and on Monday morning the hogs were so stiff that it was very wasteful in cutting, and also there was a great risk in the curing. The meat was in such a soft condition, and was kept in such a warm temperature that it was not safe to cure the meat.

Q. How much was there of that?

A. About 2,500 hogs.

Q. What did you say to him about that?

A. I brought him up into the chill room and asked him why it was so, and while it was 10 or 11 o'clock yet the windows were all closed, and I insisted upon the windows being opened then and there.

Q. What did he then say about that?

A. I do not recollect what his reply was.

Q. Now, what else?

A. Well, after that there was—that was during the winter, and then later in the spring, I one day made a thorough trip through the house, and I called Mr. Hart and told him that the house appeared to be in fairly good condition except one thing, and that was in the cellar. I told him, now I wish you would attend to the cellar and feel it as your duty to look after that part of the house, and I will take care of the balance of it, and I do want you to take care of that. Well, some time after that, in the course of twenty or thirty days, I went into the cellar, and they were delivering meat, and I asked the man in charge of that department if he was not inspecting the meat to see it was cured properly and that it was sweet on delivery, as we were having some complaints. So I asked for a trier and inspected the meat myself, and found there was a large portion of it that was soured.

Q. What is that? What does soured mean?

A. Soured meat is rejected. It is off quality.

Q. What is the condition of it ?

A. It is spoiled.

Q. What is that caused by ?

A. It is caused by neglect, and caused by allowing the house to raise to a too high temperature, and then in not handling meat often enough. The meat, after it goes into salt, is handled from five to eight days afterwards and then it is turned again, and some of this meat I found run up to twelve or fourteen days without being handled.

Q. Did you speak to Hart, and what did he say about that ?

A. After I found that meat was all bad, we had some, I think probably 3,000,000 pounds of meat in the house—dry salt meat.

Q. How much ?

A. Three million, and I think there was seventy-five per cent of that that was bad. There was fully half of it anyway.

Q. What did Hart say about that ?

A. Well, on that occasion, that was what I dismissed him for. That was one of the things.

Q. You may state, Mr. Cudahy, just your conversation with him when you dismissed him ?

A. I told him that Mr. Armour objected to having him in our employ any longer, or that he would be employed in anything that he might be connected with. So I think Hart said that that was not quite right to discharge him for that. So I said, the amount of it is you are not running this business satisfactorily, and we cannot live under it.

Q. What was said in reply to that, if anything ?

A. Well there was not anything.

Q. Do you know about what time that was ?

A. Well it was in the spring sometime, I think; about sometime in May, and I told him I would extend his salary to the first of June. I think it was about the first of May.

Q. Was it extended afterwards?

A. I afterwards sent him to settle up some spoiled meat that was sent out under his supervision.

Q. Where was that sent?

A. To Memphis. Some four car-loads of meat, I think, it cost me about \$1,000. I sent him to settle that up, and that carried him into a few days in June, and then I said we will extend your salary until the first of July.

Q. And that was a fact?

A. Yes, sir.

Q. Was there anything said to him about your helping him to get another place?

A. I told him that I would do anything that I could for him, and that he could always depend upon me and call upon me in case he needed anything—whenever he saw I could do anything for him I was perfectly willing and ready to do anything that I could for him.

In this testimony Cudahy is corroborated by a number of witnesses. In the testimony of the defendant in error in rebuttal he confirms many of the statements of Mr. Cudahy. Taking the testimony together it is clearly shown that the defendant in error did not attend to his duties faithfully and efficiently. It is true he attempts to excuse his failure by the statement that the works were new and the men not accustomed to the business, but this can be no excuse for the failure to perform his duty in March, 1888, and later. The works had been in constant operation from the month of November, 1887, and the men accustomed to their duties. It also appears that the defendant in error constantly used intoxicating liquors in considerable quantities, and permitted those foremen immediately under him to use such liquors. It is clearly shown that liquor for the use of the defendant in error and others was constantly kept at hand and was continually drunk, thus the influence of the manager was given in favor of its use by subordinates and employees. The offense is much

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more serious when committed by one in authority than by a mere laborer, as the example and influence of the manager is thus placed in favor of its use. With the amount of liquor shown to have been consumed by the defendant in error and his subordinates it is not a matter of surprise that duties were neglected and the plaintiff in error sustained loss. In our view the evidence shows so much neglect of duty on the part of the defendant in error as to justify his discharge. It is unnecessary to review the instructions.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE H. GLADE V. CHARLES C. WHITE ET AL.

FILED FEBRUARY 1, 1893. No. 4523.

Master and Servant: EMPLOYMENT OF SERVANT BY MEMBER OF PARTNERSHIP: ACTION AGAINST FIRM FOR WAGES: EVIDENCE. Under the issues presented by the pleadings the question presented is whether or not the plaintiff was employed by the firm of W. & G., and rendered services for it, or whether he was employed by G., his father, and represented him as a member of the firm. *Held*, That the evidence clearly established the fact that the plaintiff was employed and represented G., his father, and not the firm of W. & G., and that such firm was not liable for his services.

ERROR from the district court of Saline county. Tried below before MORRIS, J.

Hastings & McGintie and *M. A. Hartigan*, for plaintiff in error.

F. I. Foss, contra.

MAXWELL, CH. J.

In the year 1882 the defendant White became a partner with George W. Bridges in the milling business at Crete, and this relation continued until May, 1885, when Bridges sold his interest to John D. Glade. Glade was a well to do farmer who resided a short distance from Crete. The plaintiff is his son, and in the spring of 1885 was about twenty-two years of age. So far as appears neither of the Glades had any experience in the milling business. The business seems to have been very profitable, and was continued on an extensive scale until December, 1888, when White purchased the interest of Glade in the property and assumed the debts. Afterwards this action was brought by the plaintiff against the firm for services. The defendants filed separate answers. John D. Glade in his answer admits the service of the plaintiff, and in effect asks that judgment be rendered against the firm. White, in his answer, first denies the facts stated in the petition except as to certain matters admitted, but alleged that the plaintiff represented his father in the milling business, and that there was no agreement or claim for wages during the existence of said partnership. Other facts tending to show that the plaintiff had no right to recover are pleaded, which need not be noticed. On the trial of the cause the jury found in favor of White, but against John D. Glade, in the sum of \$5,000, upon which judgment was rendered. The question presented by the issue is this: Was the plaintiff an employe of the firm of White & Glade, or did he represent his father in the business?

W. H. Vance, a witness called by White, testifies:

A. During the first week in January, 1888, I was standing in the post-office window, about noon, waiting for the mail to be distributed. While there Glade came in—

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I had been introduced to him the Sunday evening before—and for the first time entered into a little conversation with him. I asked Mr. Glade if he was employed at the mill; he rather hesitated in his reply, and from the manner in which he——

(Objected to by the plaintiff.)

Q. What took place?

A. I asked Mr. Glade if he was employed at the mill. He gave me somewhat of an evasive answer. I asked him then if he was a partner of Mr. White's, I believe I said "You must be the partner of Mr. White's," and he replied "No, sir; I am not the partner of Mr. White, I am the active partner; my father is the silent partner, I represent my father's interest in the firm." He used these terms, that he was the active partner and his father was the silent partner and he represented his father's interest in the firm."

The plaintiff does not deny this. He claims that he does not remember.

John R. Johnson testifies:

A. The first conversation I had with Glade was in the morning; I was coming up at the time the deal was made. The day the deal was made I talked with Mr. Glade and his father down to the mill and Mr. Bridges, myself, John D. Glade, and George Glade looked the property over, and I went down to the dam and was showing him where the lines were, discussing about a piece of ground that was to be left out, and they bought the mill there, that is, they closed the deal so far as words were concerned, right at that place, and I asked John Glade if he was going to attend to the mill and he said he was not, he was buying it for George; and I said, "are you going to have it deeded to George?" and he said, "Oh, no, I will let George run it; he is a good boy and I am going to let him run it for me and look after my interests."

Q. What conversation did you have that day with George, at or about the same time?

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A. He said he was going to run it for his father.

Q. Where did that conversation take place?

A. It was talked around, I don't know just where; we were walking. They were going to enter into a contract that day.

This is not directly denied.

George D. Stevens testifies:

Q. Do you remember some time in the month of May, 1885, of having a conversation with George H. Glade in the state bank in regard to same?

A. I do.

Q. State that conversation.

A. I cannot give it—it was quite a long conversation I had with him, and part of it was about the purchase of the mill by his father, and he then told me—I think I asked him, I am sure I did, if his father was going in the milling business. He told me that he was going to run it.

Q. Did you have any other conversation in regard to that matter with Mr. Glade about that time?

A. Why, I have talked to Mr. George Glade a great many times about it.

Q. In the conversations what did he say in regard to—
(Objected to as incompetent.)

A. Possibly I did not understand that.

Q. Tell what conversation or talk took place, and when and where.

A. I could not begin and give the number of times I have ever talked with him about this matter, the exact conversation, but in all the conversations I have ever had with him in reference to this matter I have understood from him and lead to believe from what he said—

By the court: State what he said.

A. He said a great many times to me that he was managing and looking after his father's interest in the mill. At one time I asked him if White spent his own time there, and he said no, he was to look after the outside

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interest while he remained there and looked after his father's interest, and looked after the mill when Mr. White was not there. I cannot give the number of times that I have conversed with Mr. Glade on that matter.

A number of other witnesses testify to the same effect. The plaintiff was unable to remember many of these conversations, but in our view the fact is established beyond question that the plaintiff rendered his services to his father and not to the milling company, and that White is not liable. It is unnecessary to review the various assignments of error at length. The judgment is the only one that should be rendered on the evidence, and it is

AFFIRMED.

THE other judges concur.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. MERRICK COUNTY ET AL., APPELLEES.

FILED FEBRUARY 1, 1893. No. 4656.

Taxes Upon Material for Railroad Construction: ENJOINING COLLECTION. In an action to enjoin certain taxes assessed by the local assessor upon material for the construction of a railroad which was piled up near Central City and had so remained for a long time, *held*, that the material was taxable, and in the absence of proof that it had been assessed by the state board, there was no presumption to that effect, and that the taxes assessed by the local assessor would not be enjoined.

APPEAL from the district court of Merrick county. Heard below before Post, J.

A. W. Agee and *Marquett & Deweese*, for appellant.

A. Ewing and W. T. Thompson, contra.

MAXWELL, CH. J.

In the years 1887 and 1888 the plaintiff was engaged in extending its line north from Central City and stored at that point a large quantity of material for the construction, repair, and operation of its said road. A portion of this material was not used for the purposes named, but remained on the ground at that point in the spring of 1889. This being so the assessor of Central City secured the listing of the property by the tax agent of the plaintiff and fixed the value of the property for the purposes of taxation at \$60,242.54, and taxes to the amount of \$2,948.75 were levied thereon. The plaintiff thereupon brought this action to enjoin the payment of the taxes and on the trial of the cause required the court to make special findings, which it did as follows:

"1. That said plaintiff is, and for several years last past has been, a corporation duly organized and existing according to law, and as such engaged in the operation of various lines of railroad in this state, of which it is the owner; that among said lines of railroad is a line of railroad extending from Lincoln to Aurora, Nebraska, through the counties of Lancaster, Seward, York, and Hamilton, and thence northerly to Central City, in Merrick county, which line is known as the Nebraska railroad and the Republican Valley railroad; also a line of railroad extending from Central City in Merrick county through the counties of Howard, Greeley, Garfield, and Valley, known as the Lincoln & Black Hills railroad, and various other lines, all being known as the Burlington system, and all owned and operated by the plaintiff under one common management and in one name, to-wit, The Burlington & Missouri River Railroad Company in Nebraska.

"2. That all of said lines of road are operated as a single

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system and without any distinction between lines having different charter names, all lines being managed and controlled by the same general officers.

"3. That said Republican Valley railroad, and said Lincoln & Black Hills railroad were built during the years of 1887 and 1888.

"4. That for the purpose of constructing its said lines of railroad and keeping the same in repair, and constructing depot buildings, platforms, and telegraph lines necessary for the successful operation of its said several lines of railroad, and keeping the same in repair, material belonging to the plaintiff, and consisting of rails, ties, spikes, bolts, telegraph poles, and other material and fixtures, was shipped and piled up near Central City, Nebraska, in Lone Tree precinct, in close proximity to the main and side tracks of plaintiff's line of railroad at said point, a portion being within fifty-one feet of the main line of the center track of the plaintiff's line of road.

"5. The evidence does not show the extent of the plaintiff's depot grounds at Central City, nor its right of way through Lone Tree precinct, nor at any point in said precinct.

"6. The ground upon which said material was piled up lay on each side of the main track, and was about 3,000 feet long, and had running through it the main track and five side tracks, and was necessary for storing material necessary for the construction, operation, and repair of the plaintiff's lines of road.

"7. All of said material was personal property, necessary and intended for use, and was used in the construction, repair, and operation of plaintiff's lines of road, and was stored in said precinct temporarily for convenience in shipping out and using the same in the construction, repair, and operation of said lines of road. No part of the same was personal property for use in any general office building, machine shop, or repair shop, or store houses, or

for use at any particular point on said line of road, but the same was shipped out and used as needed in the construction and repair and operation of the various lines of road built, owned, and operated by the plaintiff.

"8. On the 25th day of May, 1889, one E. Van Tyle, who was then acting in the capacity of tax auditor for the plaintiff, or the Burlington & Missouri River Railroad Company in Nebraska, commonly known as the B. & M. R. R. Co., made out a list or schedule of the personal property of said B. & M. R. R. Co. subject to taxation in Lone Tree precinct, Merrick county, for said year, and the property so listed by said Van Tyle is the same property which is described in plaintiff's petition, and amounts to \$60,242.34 in value.

"9. That said list or schedule was delivered by said Van Tyle to the precinct assessor of said Lone Tree precinct, and by him entered upon the tax list for said precinct, and assessed at \$60,242.34.

"10. That said precinct tax list was afterwards returned to the county clerk of Merrick county, and after the assessments for said year had been equalized by the state and county boards of equalization, the tax complained of, to-wit, \$2,948.75, was levied by the county board of Merrick county on account of the personal property so listed by said Van Tyle, and assessed by the assessor of Lone Tree precinct.

"11. That the said property so listed by said Van Tyle with the precinct assessor was transcribed on the county tax list for said year, and extended upon said lists as property of the B. & M. R. R. Co.

"12. The plaintiff did not appear before the board of equalization for said year for the purpose of having said assessment corrected, nor did the B. & M. R. R. Co., or its agents, or any of the agents for the plaintiff appear for said purpose.

"13. The property described in plaintiff's petition was

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not returned by it or the B. & M. R. R. Co., or any of its or their agents, to the auditor of public accounts for assessment and taxation for said year by the state board of equalization, and the same has not been assessed for said year otherwise than by the assessor of said Lone Tree precinct.

"14. Neither the plaintiff nor the B. M. R. R. Co., nor any of their agents, have paid or offered to pay the taxes upon said property for said year 1889.

"15. That the defendant, J. B. Templin, as treasurer of said county, has issued a tax warrant for the collection of said tax to the defendant W. H. Crites, sheriff of said county; and that at the time of the commencement of this action said sheriff held said warrant and threatened to levy the same on and take possession of the cars and property of the plaintiff, and sell the same for the payment of said tax; and still threatens to, and will levy on such property and collect said tax, unless restrained by injunction.

"CONCLUSIONS OF LAW.

"1. That plaintiff had a plain, speedy, and adequate remedy at law.

"2. That on the facts as proved it is not entitled to relief in this proceeding.

"3. That plaintiff's bill should be dismissed.

"It is therefore ordered and decreed that the plaintiff's bill be dismissed and that it go hence without relief, and that the temporary injunction heretofore allowed be dissolved and discharged. It is further ordered and adjudged that defendants recover of and from the plaintiff the costs herein expended taxed at \$——."

The principal complaint of the plaintiff is, that there is no evidence to support the 13th finding, and that the presumption is that the state board assessed the property in question, hence it is liable to double taxation thereon. We must remember that the object of this action is to enjoin

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the taxes in question, not because the property was not taxable, but because it had already been assessed. Relief is to be granted, if at all, upon proof of such double assessment. This proof is to be furnished by the plaintiff. Did the plaintiff return the property in question to the state board? If it did, the return will show. If it did not, it has no cause of complaint. The revenue law of this state is designed to make a fair and just apportionment of taxes upon all the taxable property of the state whether the owner be a wealthy corporation or a person of but little means. There is no complaint that the property is assessed too high or that the tax itself is unjust if the property has not already been assessed by the state board. The proof fails to show that it was so assessed. There is no equity in the petition and the judgment is

AFFIRMED.

NORVAL, J., concurs.

POST, J., not sitting.

STATE OF NEBRASKA, EX REL. JOHN F. CROMELIEN,
v. JAMES E. BOYD, GOVERNOR.

FILED FEBRUARY 1, 1893. No. 5776.

Additional Representation in Congress: ELECTION PROCLAMATION: MANDAMUS TO GOVERNOR: JURISDICTION. By the apportionment act of February 7, 1891, Nebraska is entitled to six representatives in congress after the 3d day of March, 1893. In an action to compel the governor to call an election for three additional members of congress to fill a vacancy caused by the want of representation in the present congress, *held*, that the question was a political and not a judicial one; that by reason of improved methods the census was more rapidly taken and the returns classified than formerly,

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so that the population of each state was known a few months after the enumeration was made, and that to deprive those states entitled to increased representation for two years was unjust, but congress must provide the remedy.

ORIGINAL application for *mandamus*.

John F. Cromelien and *H. D. Estabrook*, for relator.

George H. Hastings, Attorney General, *contra*.

MAXWELL, CH. J.

This action was begun November 1, 1892, the object being to compel the defendant, as governor of the state, to issue his proclamation for the election on November 8, 1892, of three additional members of congress. The questions involved were too important to be decided without a full examination, and in the short time before the election a thorough investigation could not be made, hence the decision was delayed. In the petition the relator alleges: " * * * that on March 1, 1892, was approved an act by the senate and house of representatives of the United States of America in congress assembled, entitled 'An act to provide for taking the eleventh and subsequent censuses,' section 1 of which said act providing that the census of the population, wealth, and industry of the United States shall be taken as of date of June 1, 1890, a copy of which said act is hereto attached, marked 'Exhibit A,' and made a part hereof; that the census of the population of the United States was made in pursuance of said act, and duly promulgated prior to the 12th day of December, A. D. 1890; that it was found from said census that in certain states in the Union there had not been sufficient increase in the population of said states to warrant an increase, or entitling said states to an additional number of representatives in congress, that is to say, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa,

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Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming.

"That in the fifty-first congress, and for ten years prior thereto, said states had, under existing apportionment acts, been entitled to the following number of representatives, to-wit: Connecticut, 4; Delaware, 1; Florida, 2; Idaho, 1; Indiana, 13; Iowa, 11; Kentucky, 11; Louisiana, 6; Maine, 4; Maryland, 6; Mississippi, 7; Montana, 1; Nevada, 1; New Hampshire, 2; New York, 34; North Carolina, 9; North Dakota, 1; Ohio, 21; Rhode Island, 2; South Carolina, 7; South Dakota, 2; Tennessee, 10; Vermont, 2; Virginia, 10; West Virginia, 4, and Wyoming, 1.

"That in the fifty-second congress of the United States, being the present congress, each and every of said states last above mentioned was represented by the same number of representatives as in the fifty-first congress, and those prior thereto, that is to say, each of said states had and has in said fifty-second congress the number of representatives last above enumerated, and will continue so to have said representation for the ensuing ten years.

" * * * that prior to the census of 1890, under the apportionment act of 1880, the state of Nebraska has been entitled to three representatives in congress, and that in the fifty-first congress Nebraska was represented by three congressmen, and had been so represented for ten years prior thereto; that immediately upon the promulgation of the census of 1890 it was apparent that for Nebraska to have an equal representation in the fifty-second congress with the states heretofore enumerated, three additional representatives should be elected from said state of Nebraska, and that in the fifty-second congress Nebraska was, and is, entitled to six representatives, but your relator makes

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known to your honorable court that the fifty-first congress of the United States, ignoring the rights of Nebraska to an equal representation with the other states in the Union in all subsequent congresses, passed an act approved February 7, 1891, entitled 'An act making an apportionment of representatives in congress among the several states under the eleventh census,' section 1 of which said act provides *that after the 3d day of March, 1893*, the house of representatives shall be composed of 356 members, to be apportioned among the several states, giving to the states herein first enumerated the same number of representatives that said states had in the fifty-first congress, and all congresses subsequent to the census of 1880, and to the state of Nebraska six representatives.

"Your relator claims that in so far as said apportionment act passed by said fifty-first congress undertakes to postpone the equal representation of Nebraska in the congress of the United States until after the 3d day of March, 1893, that said act is nugatory and void, and that the state of Nebraska was, and is, under the apportionment act adopted by the fifty-first congress as the basis of representation, entitled to six representatives in the present congress, a copy of which said apportionment act is hereto attached, marked 'Exhibit B,' and made a part hereof.

" * * * that the people of the state of Nebraska did not and have not elected three additional congressmen at large to fill the vacancies in said fifty-second congress, as provided in the apportionment act of February 7, 1891, and that there are now existing three vacancies in the present congress, which ought to be filled by a special election of three congressmen at large, by the people of the state of Nebraska; that on the 29th day of October, A. D. 1892, and at divers and sundry times prior thereto, your relator demanded of his excellency, James E. Boyd, governor of the state of Nebraska, being the respondent herein, that he issue his proclamation as provided by statute, for a special

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election to fill said vacancies in congress; that on the 17th day of October, 1892, your relator addressed a communication to his excellency, Governor Boyd, directing his attention to the matter herein involved, and emphasizing the duty of said Boyd as governor, to issue his proclamation as provided by law for a special election to fill the vacancies aforesaid, a copy of which said communication is hereto attached, marked 'Exhibit C,' and made a part hereof; that said Governor Boyd has not replied to said communication in writing, but said Governor Boyd has informed your relator verbally that he had referred the communication aforesaid to the attorney general of the state of Nebraska for his legal opinion on the points involved, and had not obtained as yet an expression of opinion; that on the 29th day of October, A. D. 1892, he called personally upon said Governor Boyd at the governor's office in the capitol, in the city of Lincoln, Nebraska, and made formal demand that he issue his proclamation for a special election to fill the vacancies aforesaid; and the said Governor Boyd then and there positively refused to issue such proclamation, giving as his reason, that the matters in question were of too vast importance, the legality of the proposed action too dubious, and the consequences possibly too serious for him to assume the responsibility until the supreme court or attorney general had instructed him as to his legal duties in the premises; and the said Boyd, as governor of the state of Nebraska, joins herein with your relator, asking that this honorable court make a solution of the difficulty and thus prevent a legal controversy."

He also sets forth a copy of the act for the census of June, 1890, and the apportionment act of February 7, 1891, which is as follows:

"That after the 3d of March, 1893, the house of representatives shall be composed of 356 members, to be apportioned as follows: Alabama, 9; Arkansas, 6; California, 7; Colorado, 2; Connecticut, 4; Delaware, 1; Florida, 2;

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Georgia, 11; Idaho, 1; Illinois, 22; Indiana, 13; Iowa, 11; Kansas, 8; Kentucky, 11; Louisiana, 6; Maine, 4; Maryland, 6; Massachusetts, 13; Michigan, 12; Minnesota, 7; Mississippi, 7; Missouri, 15; Montana, 1; Nebraska, 6; Nevada, 1; New Hampshire, 2; New Jersey, 8; New York, 34; North Carolina, 9; North Dakota, 1; Ohio, 21; Oregon, 2; Pennsylvania, 30; Rhode Island, 2; South Carolina, 7; Tennessee, 10; Texas, 13; Vermont, 2; Virginia, 10; Washington, 2; West Virginia, 4; Wisconsin, 10; Wyoming, 1.

"Sec. 2. That whenever a new state is admitted to the Union, the representative or representatives assigned to it shall be in addition to the number, 356.

"Sec. 3. That in each state entitled under this apportionment, the number to which such state may be entitled in the fifty-third and each subsequent congress shall be elected by districts composed of contiguous territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of the representatives to which such state may be entitled in congress, no one district electing more than one representative.

"Sec. 4. That in case of an increase in the number of representatives which may be given to any state under this apportionment, such additional representative or representatives shall be elected by the state at large, and the other representatives by the district now prescribed by law, until the legislature of such state, in the manner herein prescribed, shall redistrict such state, and if there be no increase in the number of representatives from a state the representatives thereof shall be elected from the districts now prescribed by law until such state be redistricted as herein prescribed by the legislature of such state.

"Sec. 5. That all acts and parts of acts inconsistent with this act are hereby repealed.

"Approved February 7, 1891."

He has accompanied his application with an elaborate printed argument, in which he contends with great force that, as a matter of strict right, Nebraska is, and has been since February 7, 1892, entitled to six representatives in congress. The justice of this claim will not be denied, but can this court correct the wrong? We think not. Section I, article I, of the constitution of the United States provides:

"All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

"Sec. II. 1. The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

"2. No person shall be a representative who shall not have attained the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

"3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every 30,000, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence

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Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.

"4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

"5. The house of representatives shall choose their speaker and other officers, and shall have the sole power of impeachment."

Section 2 of the fourteenth amendment is as follows: "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislatures thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in anyway abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

It will be seen that the apportionment of representatives among the several states, after the taking of each decennial census, is made by congress upon some fixed rule or ratio which applies equally to all the states. The apportionment is, so far as appears, fair, and the only complaint is that it should take effect in 1891 instead of 1893. There is much force in the objection that the states entitled to increased representation are thereby deprived of the same for two years. The question, however, is political rather than judicial, and it is difficult to perceive in what way the

courts can remedy the defect. With the present improved modes of taking the census and classifying the returns, the population of each state can be ascertained within a few months after the actual enumeration, so that the apportionment can be made in December or January following the taking of the census. It would seem but justice that this should take effect in the succeeding congress, and we may confidently trust to that spirit of fairness so characteristic of the American people, to correct the wrong. The courts, however, have no authority to declare that a greater number of representatives shall be elected and admitted to congress than the statute specifies, and the writ must be denied and the action

DISMISSED.

The other judges concur.

36	189
46	732

UNION PACIFIC RAILWAY COMPANY V. EMIL KELLER.

FILED FEBRUARY 1, 1893. NO. 4412.

1. **Railroad Companies: DAMAGE BY FIRE FROM LOCOMOTIVE: NEGLIGENCE.** In an action to recover damages for loss occasioned by railway fires it devolves on the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines.
2. ——— : ——— : ——— : **EVIDENCE.** It need not be proved that any particular engine was at fault, but it will be sufficient if it is proved that the fire was set by any engine passing over the defendant's railway, and the evidence may be wholly circumstantial, as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines, and, second, facts tending to show that it probably originated from that cause and no other.
3. ——— : ——— : **PROOF OF NEGLIGENCE UNNECESSARY.** Where the proof shows that a fire originated from an engine running

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over the defendant's railway, it is unnecessary for the plaintiff to show affirmatively any defect in the construction or condition of the engine, or any negligence in its management. Negligence will be presumed from the fact that fire was set out.

4. **Review:** EVIDENCE *held* to sustain the verdict, and there is no material error in the record.

ERROR from the district court of Buffalo county. Tried below before CHURCH, J.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

Gillespie & Murphy, contra.

MAXWELL, CH. J.

This is an action to recover damages for the destruction by fire of a granary and about 1,200 bushels of oats on the plaintiff in error's right of way at Kearney. On the trial of the cause in the court below a verdict was returned for the sum of \$300, upon which judgment was rendered. The plaintiff below in his petition alleges, in substance, "that on or about the 29th day of September, 1888, the plaintiff was the owner of a certain granary containing about 1,200 bushels of oats, situated on the defendant's right of way in the city of Kearney, Nebraska, 'by and with the consent and permission of said defendant'; that on or about the 29th day of September defendant, by its servants, etc., in operating and running its engines over said line of road at or near said granary * * * negligently and carelessly permitted an engine to cast out sparks and coals of fire therefrom, which set on fire combustible material situated on defendant's right of way; that said fire spread onto and over the granary of said plaintiff, and totally destroyed the same without any fault or negligence on the part of the plaintiff. That the granary was worth the sum of \$75; that it contained 1,200 bushels of oats, whose market value at the

time of the fire in the city of Kearney was twenty-five cents per bushel. Judgment prayed for \$375, with interest at the rate of seven per cent per annum from the 29th day of September, 1888, with costs."

In its answer the railway company denies that Keller was the owner of the granary destroyed; denies that he built the same on the company's right of way with the consent of the company; denies that it negligently and carelessly permitted one of its locomotives to cast out sparks and coals of fire, or permitted its engines to set out fire; denies that the plaintiff's building was of the value of \$75, or that it contained 1,200 bushels of oats, and denies the damages, etc. It also alleges that the plaintiff's granary was erected on that portion of the right of way held by the Bogue & Sherwood Company under a written lease which exempted the company from liability for loss by fire, etc.

The reply is a general denial.

The testimony tends to show that one David Bohrer, erected the building in question, to store grain in to ship over the railway. The building was erected with the understanding that it should be moved off the right of way whenever the company demanded. Bohrer does not seem to have shipped any grain, but sold the building to Keller who seems to have had a large quantity of oats therein for shipment. The testimony also shows that before the fire the company had leased the ground on which the building stood, with other ground, to Bogue & Sherwood Company; that that company had erected coal sheds on a part of the ground so leased but did not need the ground on which the granary stood, and therefore consented to permit the building to remain for a time. So far as we can see, Bogue & Sherwood Company's lease does not enter into the case. There is testimony in the record tending to show that engine No. 805 passed through Kearney shortly before the fire, going west; that this engine set out fire at five differ-

ent places along the railroad a short distance east of Kearney. There is also testimony from which the jury would be justified in finding that the engine in question set out the fire. Certain witnesses were called to prove that the engine in question was in good repair and had modern appliances to prevent the escape of fire. The scope of this testimony may be inferred from that of W. S. Dolson. He testified in regard to the fire as follows:

Q. Do you know how long before that there was any engine in the yard?

A. I cannot say positively; I know there had not been any in the yard for two hours.

Q. State what locomotive you were handling that day.

A. Eight hundred and five.

Q. How long have you been acting in the capacity of fireman and locomotive engineer?

A. About nine years.

Q. State your experience in handling engines.

A. I have served about three years running one, and over six firing.

Q. State what are the most approved appliances, if any, used to prevent the escape of fire from a locomotive.

A. They have kind of a reflecting plate and a fine netting.

Q. State, if at the time you were handling this engine on this day, your engine was properly provided with a reflecting plate.

A. Yes, sir; and a proper netting also.

Q. State if you examined it.

A. No, sir; I did not examine it myself; the engines are overhauled every trip.

Q. State if your engine was throwing any fire during this trip.

A. She was throwing no fire to speak of that I could see.

Q. State if she was throwing fire while you were running through the yard.

A. We were not working any steam to amount to anything, and in working no steam an engine will not throw any fire.

Q. Explain how it is that in working no steam an engine will not throw any fire.

A. In working steam the exhaust draws the fire through the flues out of the stack, but if she is shut off there is no exhaust and we cannot throw any.

Q. You were running in the yards without working steam?

A. Yes, sir; I pulled off with a few cars and then backed down; there was only two or three cars and they would not work the engine hard enough to throw fire.

He also states that on the straight smoke-stacks they do not use spark arresters, some other device being substituted.

The court instructed the jury as follows:

"1. To warrant the jury in finding for the plaintiff you must first determine from the evidence whether the fire which occasioned the damage complained of originated from the engine of defendant as averred in plaintiff's petition, and in addition thereto you must find that the fire originated from the negligence of defendant's servants by means of their carelessness, or by means of defective engines or machinery, and the plaintiff did not directly, by his own negligence, contribute toward the destruction of the house and oats sued for herein.

"2. If the evidence fails to satisfy you that the fire which caused the injury originated from the defendant's engine you will inquire no further, and at once render a verdict for the defendant, and you will bear in mind that it is incumbent upon the plaintiff by a preponderance of evidence to satisfy you that the fire which did the injury originated from the defendant's engine.

"3. If you are satisfied that the fire did originate from the engine as claimed, then the burden is upon the de-

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fendant to remove a presumption, though small, indeed, of negligence; to show you that the engine of the defendant from which the fire escaped was in good order, properly constructed, and provided with the usual appliances and spark arrester to prevent the escape of fire, and if you so find, then it is your duty to find for the defendant, as the defendant would not be liable if they used the most approved appliances, engine, and machinery, and it was carefully handled and managed by the servants of the defendant, unless the jury believe the defendant or its employees were guilty of actual negligence.

"4. Though the jury believe from the evidence that the engine of defendant were supplied with a 'spark arrester' and other contrivances to prevent the escape of fire from the engine of the most approved style and pattern, yet if the jury believe from the evidence that the employees or servants of defendant operating its locomotives at the time of the fire mentioned in the petition failed or neglected to exercise due care and caution in so operating and running said locomotive, and that for want of such due care and caution the said fire was communicated by said locomotive or engines to the house of plaintiff described in the petition, then they will find for the plaintiff.

"5. If you find the fire which occasioned the damage complained of originated from defendant's engine by the carelessness of defendant's servants having same in charge, or from a defective engine and one without latest appliances to prevent escape and spread of fire, and you further find the negligence of the plaintiff did not contribute toward the damage, you will find for the plaintiff, and assess his damages at such sum as you think the evidence shows the house and oats were damaged.

"6. If you find from the evidence that defendant permitted plaintiff to keep the house on the right of way, conditioned that plaintiff should remove the same upon notice, and you find that defendant's engine, by the emission of

sparks from a defective engine, or that by reason of defendant's servants neglecting to exercise due care and caution in operating said engine, and that from such want of care and caution the fire was communicated to plaintiff's house, you will find for the plaintiff.

"7. You are the sole judges of the credit that ought to be given to the testimony of the different witnesses, and you are not bound to believe anything to be a fact because a witness has stated it to be, provided the jury believe from all the evidence that such witness is mistaken or has knowingly testified falsely. Take this case, and from all the facts and circumstances of the case, return such a verdict as you believe to be just."

These instructions, taken together, submit the questions involved fairly, as shown by the testimony, to the jury.

The company also asked the following instructions which were given by the court:

"The jury are instructed that the burden of the proof is on the plaintiff to show conclusively that the fire that burned his barn or granary was negligently and carelessly set out by the defendant, and unless he should so show you must find for the defendant. In considering this, you will bear in mind that even though the plaintiff shows that the defendant's engine did set out the fire, this of itself is not negligence, for if the defendant shows that the engine alleged to have set the fire was provided with all the appliances commonly used in preventing fire from escaping, it will not be liable for such a precaution, will not allow the plaintiff to recover.

"2. The jury will bear in mind that if the plaintiff does show that the fire was caused by the defendant, it is competent for the defendant to show that the engine or engines alleged to have caused the fire were provided with the best known appliances for preventing fire from escaping from the smoke-stack or ash pan, and if the defendant does prove that it has used all due care and caution to pre-

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vent fire by equipping the engine with such appliances, and that its engine or engines were handled by competent and careful men and in a safe manner, you must find for the defendant, even though you may believe the fire was caused by the defendant's engines. That is, if the defendant has used care to prevent fire it has done all that is required of it, and will then not be liable.

"3. If you should find that the plaintiff's building which was burned was on the defendant's right of way, and was not used as a warehouse for storing goods awaiting shipment, and that plaintiff, or the one of whom he purchased the building, was ordered by the defendant to remove the building from the ground, and neglected and refused to comply with such order, he cannot recover, and you must find for the defendant, for, if after being warned to remove from the right of way, the law presumes he took all the risk upon himself of loss in not complying with the demand, and remaining there did so at his own risk. You cannot presume that he was ignorant of the danger and exposure to fire.

"4. If you find that the plaintiff was on the defendant's right of way by virtue of a lease, either verbal or written, made with the defendant, or from any one as a sublessee, to whom it had rented the ground, and that one of the conditions of the lease was that the lessee assumed all risks of damage by fire caused by defendant as a part of the consideration he cannot recover, and you must find for the defendant; such a release from damages would be valid, and constitute a bar to plaintiff's recovering."

These instructions certainly were very favorable to the company.

It also asked the following instructions, which were given as modified:

"1. The jury are instructed that the burden of the proof is on the plaintiff to show conclusively that the fire that burned his barn and granary was negligently and care-

lessly set out by the defendant, and unless he should so show, you must find for the defendant. In considering this, you will bear in mind that even though the plaintiff shows that the defendant's engine did set out the fire, this of itself is not negligence, for if the defendant shows that the engine alleged to have set the fire was provided with all the appliances commonly used in preventing fire from escaping, it will not be liable for such a precaution, will not allow the plaintiff to recover. (Modified as follows :) Unless you find from the evidence that by the carelessness of the defendant's servants having the engine in charge.

"Modifications excepted to by the defendant.

"3. If you find that the plaintiff's building, which was burned on the defendant's right of way, and was not used as a warehouse for storing goods awaiting shipment, and that plaintiff, or the one of whom he purchased the building, was ordered by the defendant to remove the building from the ground and neglected and refused to comply with such order, he cannot recover, and you must find for the defendant; for, if after being warned to remove from the right of way, the law presumes he took all the risk upon himself of loss, in not complying with the demand, and remaining there did so at his own risk. You cannot presume that he was ignorant of the danger and exposure to fire. Unless you find that the fire was occasioned by the gross negligence of the defendant.

"Modifications excepted to by defendant.

"4. If you find that the plaintiff was on the defendant's right of way by virtue of a lease, either verbal or written, made with the defendant or, from any one as a sublessee to whom it had rented the ground, and that one of the conditions of the lease was that the lessee assumed all risks or damage by fire caused by defendant as a part of the consideration, he cannot recover, and you must find for the defendant; such a release from damages would be valid and would constitute a bar to plaintiff's recovering. (Modified

as follows:) Unless you find the fire was occasioned by the gross negligence of the defendant.

"Modifications excepted to by the defendant."

These instructions, even with the modifications, are very favorable to the plaintiff in error, and it cannot complain on that ground.

It devolves on the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. It need not be shown that any particular engine was at fault, but it will be sufficient if the fire is proved to have been set by any engine passing over the defendant's railway, and the evidence may be wholly circumstantial, as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines, and, second, facts tending to show that it probably originated from that cause and no other. (*Field v. N. Y. Central R. Co.*, 32 N. Y., 339; *Kareen v. Milwaukee & St. P. R. Co.*, 29 Minn., 12; *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev., 271; *Grand Trunk R. Co. v. Richardson*, 91 U. S., 454; 8 Am. & Eng. Encyc. of Law, 7-8, and cases cited.) When, however, the evidence shows that a fire originated from an engine running over the defendant's railway it is unnecessary for the plaintiff to show affirmatively any defect in the construction or condition of the engine or any negligence in its management. (*Burlington & M. R. R. Co. v. Westover*, 4 Neb., 268.) In the case cited it is said: "There is a direct conflict of authorities in this country on this question. In many of the cases, particularly the early ones, it being held that it devolved on the plaintiff to prove negligence on the part of the defendant. The better rule appears to be, where it is shown that a fire has originated from sparks thrown out by an engine, to require the company to show that their engine was properly constructed, equipped, and operated. The reason for the rule, as stated in a late case in Wisconsin, being "that the agents and employes of the road know, or

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are at least bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so, what was their character. Whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information." (*Spaulding v. Chicago & N. W. R. Co.*, 30 Wis., 122; 8 Am. & Eng. Encyc. of Law, 9-10, and cases cited.) The cases on this question are classified by states in the work last mentioned, from which it will be seen that a majority of the decisions sustain the rule as above set forth. There was no error in the modification complained of. Even then they were prejudicial to the defendant in error, but no complaint is made on that ground by him. Upon the whole case there is no material error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

FIRST NATIONAL BANK OF DORCHESTER V. BENJAMIN
A. SMITH.

FILED FEBRUARY 1, 1893. No. 4924.

1. **Remedy for Indefinite Pleadings.** Where the allegations of a pleading are indefinite, the remedy is by motion to have the same made more definite and certain.
2. **Action to Recover Penalty for Taking Usurious Interest: RIGHT OF INSPECTING DEFENDANT'S BOOKS: ORDER FOR INSPECTION: POWER OF COURT.** The plaintiff in a civil action made a written demand upon the defendant for an inspection and copy, or permission to take a copy, of certain specified entries in a certain book belonging to, in the possession of,

36	199
39	91
36	199
142	663
142	758
43	542

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and under the control of the latter, relating to the merits of the suit, which demand was not complied with within four days. *Held*, That under section 394 of the Code the court in which the action is pending, or the judge thereof in vacation, has the power, on motion and notice to the defendant, to order that an inspection and copy, or permission to take a copy, of such entries shall be given within a specified time, and on a failure of the defendant to comply with such order, the court may exclude the entries from being given in evidence, or if wanted as evidence by the plaintiff, may direct the jury to presume them to be such as the plaintiff by affidavit alleges them to be.

3. ———: LIMITATION. The limitation of two years within which suit may be brought against a national bank, under section 5198 of the Revised Statutes of the United States, for taking usurious interest, begins to run from the time when the usurious interest is paid.

ERROR from the district court of Saline county. Tried below before MORRIS, J.

F. I. Foss, for plaintiff in error.

Abbott & Abbott, contra.

NORVAL, J.

On the 9th day of February, 1889, Benjamin A. Smith brought his action against the above named bank in the district court to recover the sum of \$294.66, as a penalty, under section 5198 of the Revised Statutes of the United States, for knowingly taking and receiving usurious interest for the use and forbearance of money. The bank answered by a general denial. There was a trial to the court, which resulted in a judgment in favor of the plaintiff for \$207.64. Each party filed a motion for a new trial. The motions were denied, and both parties prosecute error to this court.

Counsel for the bank insists that the petition is not sufficiently definite and certain to admit of the introduction of any evidence thereunder. This objection must be overruled. The facts constituting the several causes of action

are clearly, and with reasonable certainty, stated in the petition. Besides, no motion was filed in the court below attacking the pleading. Where the averments in a pleading are indefinite, the remedy, under the Code, is by a motion to have the same made more definite and certain. (*Farrar v. Triplett*, 7 Neb., 237; *Deaver v. Bennett*, 29 Id., 812.)

The next point made by the same counsel is that there was no competent evidence before the court below upon which to base a judgment. The only testimony introduced on the trial was the affidavit of Benjamin A. Smith, the plaintiff below, which purports to give the contents of certain portions of the discount register kept by the bank, relating to the various transactions between the bank and Smith in the matter of the payment of usurious interest. The dates and amounts of all such payments are stated. The question presented is, whether the affidavit was proper evidence of what the book referred to contained.

Section 394 of the Code of Civil Procedure provides that "Either party, or his attorney, may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his possession or under his control containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand within four days be refused, the court or judge, on motion and notice to the adverse party, may, in their discretion, order the adverse party to give the other, within a specified time, an inspection and copy, or permission to take a copy, of such book, paper, or document; and on failure to comply with such order the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party by affidavit alleges it to

be. This section is not to be construed to prevent a party from compelling another to produce any book, paper, or document when he is examined as a witness."

The record in this case shows that on the 20th day of June, 1890, plaintiff below made a written demand upon John C. Thurston, Esq., the cashier of the defendant bank, for an inspection and copy, or permission to take a copy of the entries upon the discount register kept by said bank, showing the amount of interest or discount paid by said Smith to the bank for money borrowed, or for notes discounted by it for him between certain specified dates. The demand not having been complied with within four days, or any other time, plaintiff on the 30th day of June, 1890, previous written notice thereof having been given to the bank, made application to the honorable judge of the district court of the county in which the action was pending, at his chambers in the city of Crete, for an order requiring the bank to give an inspection and copy of said entries in said book, or permission to take a copy thereof, which application was granted by said judge, and the bank was ordered and directed to give plaintiff, within ten days, an inspection and copy, or permission to make a copy of said entries. Although this order was duly served upon the bank on the next day after the same was made, the defendant absolutely failed and refused to comply therewith.

An inspection of the proceedings convinces the writer that the demand, notice, and order allowing an inspection, each with sufficient certainty or particularity described the book desired as to authorize the judge to make the order. It is objected that no fees were tendered by the plaintiff for such copy. None were demanded by any officer of the bank; besides, there is no statutory provision which requires that a party shall either pay or tender fees in order to entitle him to an inspection of a book or paper in the possession of his adversary. The bank was

not required to make a copy of the entries. It was optional with it so to do, or permit the plaintiff to make the copy himself.

It is also claimed that the judge had no jurisdiction to make the order in question in vacation. A sufficient answer to this objection is that the section quoted confers such power. It provides that the "court or judge" may make the order. It is obvious that the plaintiff has in every essential particular complied with all the requirements of the statute, so as to entitle him to prove by his own affidavit the contents of the book in question, so far as the same relate to the transactions between the parties. Our conclusion is that the court did not err in allowing plaintiff's affidavit to go in evidence, and that the bank has no just cause to complain of the judgment rendered.

The plaintiff below insists that the judgment should have been for a much larger sum. The evidence discloses that usurious interest to the amount of \$103.86 was paid by him to the bank within two years before the commencement of the suit. The recovery was for double said sum. It is also established that the further sum of \$88 was paid upon another and distinct loan of money, as illegal interest, more than two years prior to the inception of the action, but that the loan upon which said usurious interest was received was not fully paid until May 27, 1887, which was within two years preceding the bringing of the suit. The bank takes the position that the statute of limitations has run against the recovery of the penalty for the taking of the usurious sum of \$88, while the plaintiff below contends that the limitation of two years within which suit may be brought against a national bank for taking usurious interest begins to run from the payment of the note on which such interest is reserved. The question presented involves the true interpretation of the proviso clause of section 5198 of the Revised Statutes of the United States. The section declares that "the tak-

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ing, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; *Provided*, Such action is commenced within two years from the time the usurious transaction occurred."

What is meant by the phrase "from the time the usurious transaction occurred," in the connection in which it is used in the section? Clearly it does not refer to the time the usurious contract is entered into, for the section gives the borrower no right of action to recover a penalty where unlawful interest is stipulated for and not paid. But in such case the loaner merely forfeits the entire interest. Nor is it the payment of the principal sum borrowed which gives the right to sue for the penalty. The actual receipt of the illegal interest is the foundation of the borrower's right to recover the penalty and the actual payment of interest in excess of the legal rate is the "usurious transaction" referred to in the section. The period of limitation begins to run from the time the cause of action accrues. If the interpretation for which plaintiff contends should be adopted, then it would follow that a suit to recover the penalty for taking usurious interest by a national bank cannot be maintained until the loan is fully paid off. Stated differently, one who has paid large sums of money as illegal interest on a loan and is unable to pay the entire debt is not entitled to the benefit of the section. Such was not the intention of congress, nor is it the fair and reasonable import of the language of the section. The right to maintain an action to recover the penalty prescribed by

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said section 5198 accrues as soon as any unlawful interest is paid, and the two years' limitation begins to run from the time such payment is made. The following cases support the doctrine: *Shinkle v. First Nat. Bank*, 22 O. St., 516; *Hintermister v. Bank*, 64 N. Y., 212; *Stephens v. Monongahela Nat. Bank*, 88 Pa. St., 157; *Brown v. Second Nat. Bank*, 72 Id., 209; *Lynch v. Merchants Nat. Bank*, 22 W. Va., 554; *National Bank of Rahway v. Carpenter*, 52 N. J. L., 165; *Stout v. Ennis Nat. Bank*, 8 S. W. Rep. [Tex.], 808; *Henderson Nat. Bank v. Alves*, 15 S. W. Rep. [Ky.], 132.

In *Lynch v. Merchants Nat. Bank*, *supra*, the court in considering the identical question herein involved, after citing and quoting from numerous decisions from the courts of different states, in the opinion say: "If these cases do not expressly decide that the right of action for the prescribed penalty accrues at the instant any excessive interest is paid, whether it be on the original discount or at any subsequent renewal, and that each payment is in itself a cause of action against which the limitation commences to run, they so clearly indicate that such is the proper construction of the statute as to leave no doubt on the question. I have been unable to find any authority or precedent to the contrary. And as to the construction indicated, if not established by these cases, is in consonance with the letter and spirit of the statute as well as in accord with the evident reason and policy of congress in enacting it, I feel no hesitation in adopting it. Each payment of illegal interest must be regarded as a 'transaction' within the intent of the statute, and when such payment is actually made or occurs, the two years' limitation commences to run as to that payment from that time, and so on for each successive payment on renewals of the same loan; and if, when the action is commenced for the penalty, any one or more of such payments of illegal interest occurred more than two years prior thereto, no recovery can be had for it, although the original loan be then unpaid."

McCormick v. Schneider.

Both upon reason and authority we are satisfied that the action to recover the penalty for receiving the \$88 illegal interest is barred, since the same was taken more than two years before this suit was brought. Doubtless the limitation does not commence to run until the usurious loan is paid off, in a case where payments are made to a national bank on such a loan, and there is no agreement or understanding that the same is to be applied in discharge of usurious interest agreed to be paid for the use of the money, for in such a case the law will apply the payments on the principal, and not on the usurious interest; hence there would be no usurious transaction until the sum borrowed had been repaid. The judgment is

AFFIRMED.

THE other judges concur.

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40 718

**MCCORMICK HARVESTING MACHINE COMPANY V. JOHN
S. SCHNEIDER.**

FILED FEBRUARY 1, 1893. No. 4934.

1. **Setting Aside Judgment in County Court.** It is a well settled rule in this state that a judgment rendered in a county court in the absence of the defendant may be set aside, under the provisions of section 1001 of the Code of Civil Procedure, although the amount claimed by the plaintiff exceeds \$200.
2. ———: **SPECIAL APPEARANCE.** In an action before a county court the defendant appeared for the sole purpose of objecting to the jurisdiction of the court, which objection was overruled, and the defendant not appearing further, judgment was rendered against him. *Held*, That such appearance did not deprive him of the right to have the judgment set aside under the provisions of said section 1001.
3. **Service of Summons: WAIVER OF DEFECTS.** The filing of a motion to set aside the default is a waiver of all defects and irregularities in the service of the summons.

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ERROR from the district court of Holt county. Tried below before KINKAID, J.

H. M. Uttley, for plaintiff in error.

G. M. Cleveland, *contra*.

NORVAL, J.

This was an action brought by plaintiff in error in the county court of Holt county upon a foreign judgment to recover the sum of \$261.45. A summons was issued and placed in the hands of the sheriff for service, who made due return of service thereof upon the defendant by leaving a true and certified copy of the same, with all indorsements thereon, at the defendant's usual place of residence. Subsequently the defendant appeared before the county court and filed an affidavit alleging "that the only summons or copy of summons served upon or delivered to him, or left at his usual place of residence, in this case is the purported copy of summons hereto attached as Exhibit A, and made part hereof." Exhibit A is a true copy of the original summons, except that it contained no indorsement of the amount for which judgment was asked. The defendant making no further appearance in the case, judgment was rendered against him for \$261.45. Within ten days thereafter defendant filed a motion under section 1001 of the Code to set aside the judgment, which motion was denied. He thereupon prosecuted error to the district court, alleging the following grounds for reversal:

"1. The court erred in overruling the objection to the jurisdiction of the court, which objection was on the ground that no copy of the summons was ever served on the defendant in said case in the county court.

"2. The court erred in refusing to set aside the default."

The district court reversed the judgment of the county court, and this is the error complained of here.

McCormick v. Schneider.

It is a well settled rule of this court that where a defendant has entered no appearance in a cause in a justice court, he may, as a matter of right, have the judgment therein entered against him set aside. It has likewise been held that the provisions of section 1001 of the Code, relating to the setting aside of judgments before justices of the peace, apply to causes in the county court, regardless of the amount in dispute. (*State v. Smith*, 11 Neb., 238; *Tootle v. Jones*, 19 Id., 588.) But where a defendant has entered an appearance he is not entitled to have the judgment set aside, even though he may have been absent on the day of trial. (*Strine v. Kaufman*, 12 Neb., 424; *Western Mutual Benevolent Ass'n v. Pace*, 23 Id., 495; *Smythe v. Kustler*, 16 Id., 264.) It has been held that procuring the issuance of subpoenas, or the filing of a motion for security for costs, or to dismiss the action, constitutes such an appearance as to defeat his right to have the default set aside, under the provisions of said section 1001, upon the ground that judgment was entered in his absence. (*Raymond v. Strine*, 14 Neb., 236; *Bell Bros. v. White Lake Lumber Co.*, 21 Id., 525; *Howard Bros. v. Jay*, 25 Id., 279.)

Do the facts in the case at bar bring it within the principle of the decisions last cited? We do not think so. In each of the cases to which we have referred the defendant made a general appearance in the action, while in the case at bar the defendant appeared for the sole purpose of objecting to the jurisdiction of the court, or questioning its power to render any judgment against him. Whether his ground of objection was sufficient or not is quite immaterial, inasmuch as the question sought to be raised was purely jurisdictional. The appearance was not general. As he did not by motion or otherwise seek to call into operation the powers of the court, except on the question of jurisdiction, the appearance was special, and he did not thereby waive his right under the statute to have the

Van Etten v. Selden.

judgment rendered against him in his absence set aside. Therefore the county court erred in overruling the motion to set aside the default.

The defendant by filing his motion to set the judgment aside waived all defects in the service of the summons. (*Crowell v. Galloway*, 3 Neb., 220; *Freeman v. Burks*, 16 Id., 328.)

The judgment of the district court is clearly right and is

AFFIRMED.

THE other judges concur.

EMMA L. VAN ETTEN V. DAVID J. SELDEN.

FILED FEBRUARY 1, 1893. NO. 4315.

1. **Costs of Justice of the Peace: ITEMIZED STATEMENT: WAIVER.** Under section 32, chapter 28, Compiled Statutes, a justice of the peace before bringing suit for his fees must, when requested so to do, make and furnish the party for whom the services were rendered an itemized bill of his costs in order to maintain an action therefor. Such statement may be waived by the party entitled thereto.
2. **Costs of Constable: ITEMIZED STATEMENT UPON RETURN OF WRIT.** A constable is not entitled to fees for serving a writ placed in his hands, where he fails to return upon the process the particular items of his costs.
3. **Review: EVIDENCE** examined, and the verdict of the jury held to be excessive, and the judgment reversed, unless defendant in error file a remittitur as stated in the opinion.

ERROR from the district court of Douglas county. Tried below before WAKELEY, J.

David Van Etten, for plaintiff in error.

A. S. Churchill, contra.

NORVAL, J.

This action originated in a justice court. Subsequently it was appealed to the district court. The suit was instituted by David J. Selden to recover the sum of \$12.15 alleged to be due him for fees in cases brought by plaintiff in error against different parties before said Selden, a justice of the peace. Of the above sum, \$9.30 were claimed to be due for fees of the justice, and the remainder was for constable's costs, alleged to have been assigned to defendant in error. There was a verdict for the plaintiff in the district court for \$9.30, and judgment was subsequently rendered thereon in his favor for said amount.

It is contended that there can be no recovery for the reason that no itemized statement of the fees sued for was ever presented or furnished the defendant.

Section 32, chapter 28, Compiled Statutes, declares that "it shall be lawful for any person to refuse payment of fees to any officer who will not make out a bill of particulars, signed by himself, if required, and also a receipt or discharge signed by him for fees paid."

It requires no argument to show that, under the foregoing provisions of the statute, it is necessary that an officer before bringing suit for his fees, when requested so to do, furnish the party for whom the services were rendered an itemized bill of his costs, in order to maintain an action therefor. A party indebted for fees may waive such itemized account.

The defendant in error testified that no itemized statement of costs was demanded by Mrs. Van Etten, nor any one for her, before suit was brought; that he mailed to her a bill of the costs which gave the gross amount of his fees, and that he likewise demanded payment of Mrs. Van Etten; that on the day of the trial of this cause in the justice court Mr. Van Etten requested a bill of items of the costs, to which Mr. Selden replied that he would furnish it, and

he then produced his dockets and showed him the various items of his fees therein charged; whereupon Mr. Van Etten assured him that that was entirely satisfactory. Although testimony was introduced by the defendant below tending to show that prior to the institution of the action Mr. Van Etten demanded an itemized account of the costs, and that the request was not complied with, the evidence in the record was ample to warrant the jury in finding that the making and furnishing of the itemized account of the costs were waived by the defendant.

The answer filed to the petition is in effect a general denial. The plaintiff in error failed to raise by her pleading the defense now insisted upon, that the plaintiff below failed or refused to make out and furnish a bill of particulars of his fees. This defense is unavailing.

As to the fees of Constable King, amounting to \$2.85, which were assigned to Selden, there can be no recovery in this action, and the jury were so instructed, inasmuch as there is no proof in the record before us that the constable made return upon the writ placed in his hands for service, of the particular items of charges for fees for making such service. (Compiled Statutes, 1891, sec. 33, ch. 28.)

Complaint is made because the trial court refused to permit plaintiff in error to show that Selden was indebted to Mr. Van Etten in the sum of \$10 for professional services rendered. The offered testimony was properly excluded. No counter-claim, offset, or payment was pleaded in the answer. If Selden owed Mr. Van Etten anything, the latter has his remedy. Such claim is not a proper offset in an action against Mrs. Van Etten.

An examination of the evidence discloses that the amount assessed by the jury is too large. The action is to recover costs made by Mrs. Van Etten in three cases commenced by her before defendant in error, in each of which she recovered judgment. In the suit against

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Henry Jess, the justice's fees amounted to \$2.05; in the case against F. L. Gillette, they were \$2.60, and in the action against Robert J. Skiles, the total justice's fees charged are \$4.10. The entire amount of fees in the three cases is \$8.75, or fifty-five cents less than the amount found by the jury.

Again, in the Gillette case there is a charge of twenty-five cents for entering default, in addition to the statutory fee of fifty cents for rendering judgment. We are unable to find any law or authority permitting a justice of the peace to charge twenty-five cents or any other sum for entering the default of a party. The \$4.10 in the Skiles case include an item of seventy cents for granting a continuance, while only fifty cents is allowed by law a justice for such services. Unless defendant in error files a remittitur for the sum of \$1 with the clerk of this court within thirty days from the filing of this opinion, the judgment will be reversed, but in case such remittitur is filed within the time stated, the judgment will be affirmed for \$8.30.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM R. MORSE V. WILLIAM H. C. RICE.

FILED FEBRUARY 1, 1893. No. 4785.

1. **Receipt: CONTRACT: PAROL TESTIMONY.** A written receipt may be explained or contradicted by parol testimony. But when it embodies a contract it cannot be contradicted, but is conclusive upon the parties, in the absence of fraud or mistake. Rule applied.
2. **Certificate of Deposit: INTEREST: DEMAND.** In an action upon a demand certificate of deposit it was held, in the absence

36	212
49	711
50	555
55	593
55	626

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of any agreement as to interest, that interest is to be computed at the rate of seven per cent from the time payment of the certificate was demanded of the defendant, and in case no such demand has been made, then from the date of the commencement of the action.

3. **Evidence: INSTRUCTIONS.** *Held*, That there is no error in the charge of the court, and that the evidence sustains the verdict of the jury.

ERROR from the district court of Merrick county. Tried below before MARSHALL, J.

J. W. Sparks and J. C. Martin, for plaintiff in error.

A. Ewing and W. R. Watson, *contra*.

NORVAL, J.

On the 11th day of January, 1890, defendant in error brought his action in the district court to recover the sum of four thousand dollars and interest upon two certificates of deposit, executed by plaintiff in error for the sum of \$2,000 each, dated respectively January 25, 1888, and February 3, 1888. The certificates are alike except as to dates and numbers, and in words and figures following:

“\$2,000. CLARKS, NEB., January 25th, 1888. No. 2089.

“W. H. C. Rice has deposited with W. R. Morse, banker, two thousand dollars, payable to the order of himself in current funds on the return of this certificate properly endorsed, any month after date, with interest at — per cent per annum.

“This certificate will not be paid until due, and interest ceases at maturity. W. R. MORSE.”

The petition filed in the court below is in the usual form. The answer admits the execution and delivery of the certificates, denies that payment thereof was ever demanded, and alleges that defendant, on the 14th day of January, 1889, transferred to plaintiff a certain promissory note for

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\$280, drawing interest at ten per cent from July 14, 1888, which note, it is averred, plaintiff has collected and agreed to give defendant credit therefor upon said certificates of deposit. The defendant further pleads payment on the 12th day of February, 1889, of the sum of \$1,152, by transferring to plaintiff three promissory notes aggregating that sum.

The plaintiff for reply admits the receipt of the notes; avers that they were transferred to him by defendant as collateral security for the payment of said certificates of deposit, and that no part of said notes has ever been paid.

Upon the trial the jury returned a verdict in favor of the plaintiff for \$4,060.77. Defendant brings the cause to this court for review on error.

It is undisputed that Mr. Morse delivered to Mr. Rice, as collateral security, a promissory note executed by one Fremont Hoy, calling for the sum of \$280, and interest. As the testimony shows that no part of this note has ever been collected or paid, plaintiff in error is not entitled to a credit in this action on account of said note.

It is conceded that on the 12th day of February, 1889, plaintiff in error turned over to defendant in error three promissory notes described as follows: One for \$67, dated February 1, 1889, due in nine months, drawing interest at ten per cent from date, signed by Ray Miller and Albert Miller; one for \$535, drawing interest at ten per cent, executed by Henderson Miller and Albert Miller, bearing date February 1, 1889. The other was signed by Albert Miller and Henderson Miller, calling for \$550 with interest at ten per cent, dated February 1, 1889, and due in nine months. No part of these notes has been paid. At the time the notes were delivered to Mr. Rice he executed an instrument and gave the same to Mr. Morse, as follows:

Morse v. Rice.

"CENTRAL CITY, Feb. 12, 1889.

"Received of W. R. Morse three notes in amount of \$1,152, for which I hereby credit on account.

"W. H. C. RICE."

On the trial plaintiff below introduced testimony tending to establish that at the time the notes were delivered to him and the above receipt therefor was given, the agreement between the parties was that the notes were taken solely as security for the payment of the certificates of deposit, and at the same time Mr. Morse further promised to take up these notes in thirty days and pay one-half of the certificates, and pay the remainder before the following July.

It is contended that the trial court erred in admitting oral evidence to contradict or explain the receipt. It is an elementary rule that parol contemporaneous evidence is inadmissible for the purpose of explaining, varying, or modifying the terms of a valid written contract. In such case the writing must govern. It is also a well settled principal of law that a simple receipt is only *prima facie* evidence of the truth of the statement therein contained, and as between the parties is always subject to parol explanation or contradiction. But when a receipt also embodies a stipulation in the nature of a contract, it is not open to contradiction, but is conclusive upon the parties, in the absence of proof of fraud or mistake. Among the numerous authorities which sustain this doctrine may be cited: *Price v. Treat*, 29 Neb., 536; *Morris v. St. Paul & C. R. Co.*, 21 Minn., 91; *Cummings v. Baars*, 36 Id., 350; *Elsbarg v. Myrman*, 41 Id., 541; *American Bridge Co. v. Murphy*, 13 Kan., 35; *Clark v. Marbourg*, 33 Id., 471; *St. Louis, Ft. S. & W. R. Co. v. Davis*, 35 Id., 464; *Stapleton v. King*, 33 Ia., 28; *Kellogg v. Richards*, 14 Wend. [N. Y.], 116; *Coon v. Knap*, 8 N. Y., 402; *Smith v. Holland*, 61 Id., 635; *Michigan C. R. Co. v. Dunham*, 30 Mich., 128; *McAllister v. Engle*, 52 Id., 56; *Smith v.*

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Schulenberg, 34 Wis., 41; *McKinney v. Harvie*, 35 N. W. Rep. [Minn.], 668; *Grant v. Frost*, 13 Atl. Rep. [Me.], 881.

We do not agree with counsel for plaintiff in error that the writing in question is a contract within the rule excluding parol evidence. In law it is only a receipt, and, as such, was open to explanation by parol proof. It was competent to show by oral testimony what took place between the parties previous to and at the time the receipt was given; in other words, what the actual transaction was; that, if such was the case, the three notes were received, not as payment upon the certificates of deposit, but solely as collateral security. The exception to the admission of the testimony in this case already referred to must therefore be overruled.

While the plaintiff in error testified on the trial that the understanding between the parties at the time was that he was to receive credit for the certificates for the amount of the three notes, we are satisfied, after a careful perusal of the bill of exceptions, that the jury were justified in not accepting that view of the transaction. No indorsement was ever made upon the certificates in suit of the amount of the three notes, nor was defendant in error ever requested to make such indorsement. No claim was made by the plaintiff in error, prior to the commencement of this action, that the notes were to be credited, whether collected or not, upon the certificates of deposit. The letters which passed between the parties since the giving of the receipt, copies of which are in the record, as well as the fact that Mr. Morse urged the makers of the notes to pay them after they had been turned over to Mr. Rice, corroborate the testimony of the plaintiff below.

Complaint is made of the giving of the seventh paragraph of the court's charge to the jury relating to the question whether or not the notes were given and accepted as, absolute payment, or merely as collateral security. This,

was proper in view of the conflicting evidence. Counsel are in error in assuming that the court thereby submitted to the jury the question of the legal interpretation of the written receipt. No such proposition was presented to them to decide. The court permitted both parties to introduce parol testimony relating to the turning over of the notes and the giving the receipt for the same, and from the entire testimony the jury were to determine what the transaction was.

Exception is taken to the fifth instruction, which reads as follows:

"5. The jury are instructed that if from the evidence they believe that the plaintiff by his authorized agent, on the 24th day of December, 1888, made demand of the defendant for payment of said certificates of deposit, then said certificates of deposit would draw interest from that date until the present at the rate of seven per cent per annum. If the jury do not find that said demand was made at that time, then said certificates of deposit would draw interest at the rate of seven per cent per annum from the 11th day of January, 1890, the date of the commencement of this suit."

The testimony introduced by defendant in error tends to show that the certificates of deposit were presented to Mr. Morse on the 24th day of December, 1888, and payment thereof requested. On the other hand there was testimony to the effect that payment of the certificates was never asked. It will be observed that the certificates were due and payable on demand, but no rate of interest was specified. They would draw interest only at the rate of seven per cent from the time payment was demanded of defendant and if no demand was made, then from the date of the institution of the action. We think the instruction was correct in substance and form. The judgment of the district court is clearly right and is

AFFIRMED.

THE other judges concur.

Merchants Natl. Bank of Omaha v. Jaffray.

36	218
36	726

**MERCHANTS NATIONAL BANK OF OMAHA V. EDWARD
S. JAFFRAY ET AL.**

FILED FEBRUARY 1, 1893. No. 4759.

- 1. Attachment: ORDER: JUDICIAL ACT.** An order by a district or county judge allowing an attachment in an action on a claim not due is a judicial act within the meaning of sec. 38, ch. 19, Comp. Stats.
- 2. An order made by a judge on Sunday or a legal holiday** allowing an attachment in an action on a debt not due is void.

ERROR from the district court of Douglas county. Tried below before **CLARKSON, J.**

George E. Pritchett, for plaintiff in error.

Kennedy & Learned, contra.

POST, J.

This is a controversy between attaching creditors. The plaintiff in error on the 25th day of December, 1890, filed its petition in the district court of Douglas county against **Henry Eiseman and Simon Eiseman** claiming judgment for \$3,580 on a debt not due. At the same time it filed an affidavit in substantial compliance with section 238 of the Code, whereupon an order was on the same day made by **Hon. Geo. W. Doane**, one of the judges of the district court for said county, allowing an attachment against the property of the defendant therein, which was issued in due form and by virtue of which the property in controversy was on the day above named seized by the sheriff. The order of attachment through which defendant in error claims was issued December 26, 1890.

There are several questions argued which it is not necessary to notice, as the judgment of the district court must

be affirmed on the ground that the order of attachment through which the plaintiff claims is void.

It is by sec. 38, ch. 19, Comp. Stats., provided that "No court can be opened, nor can any judicial business be transacted, on Sunday, or on any legal holiday, except, first, to give instructions to a jury then deliberating on their verdict; second, to receive a verdict or discharge a jury; third, to exercise the powers of a single magistrate in a criminal proceeding."

And by sec. 8, ch. 41, it is provided as follows:

"That the following days, to-wit, the first day of January, February twenty-second, and the twenty-second of April, which shall be known as 'Arbor Day,' the twenty-fifth day of December, the thirtieth day of May, and July fourth, and any day appointed or recommended by the governor of this state or the president of the United States as a day of fast or thanksgiving, and when any one of these days shall occur on Sunday, then the Monday following shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, or promissory notes, made after the passage of this act, be deemed public holidays, and be treated and considered as is the first day of the week commonly called Sunday; *Provided*, That when any one of these days shall occur on Monday, any bill of exchange, bank check, or promissory note, made after the passage of this act, which but for this act would fall due and be payable on such Monday, shall become due and payable on the day thereafter."

It is not deemed necessary to discuss the question of the validity of an order of attachment or the service thereof on Sunday or a legal holiday in ordinary cases, that is, for debts already due. There is, to say the least, a diversity of opinion upon the subject. A respectable line of authorities hold such acts to be purely ministerial and therefore

Sprague v. Fuller.

not within the inhibition of the statute particularly when assailed in collateral proceedings. But an order of a judge allowing an attachment as in this case is clearly within the statute. Judicial acts are defined to be "such acts as are performed in the exercise of judicial power." (Hawes, Jurisdiction, 4.) Bouvier defines judicial power thus: "Belonging to or emanating from a judge as such, the authority vested in a judge." "Whatever emanates from a judge as such, or proceeds from a court of justice is judicial." (*In re Cooper*, 22 N. Y., 82.) An attachment will be allowed in an action for a claim before it is due only upon the grounds and the conditions prescribed by statute. One of the conditions is that the plaintiff or his attorney shall make oath in writing showing the nature of his claim and when it will become due. (Code, 238.) When the application is made the court or judge must determine judicially that the action is one of those contemplated by the statute and that the showing is sufficient to entitle the plaintiff to an attachment. The validity of the attachment under which the defendant claims depends upon the order made by the judge on the 25th day of December, a legal holiday. That order was a judicial act expressly forbidden by statute and is therefore void. (*Moore v. Herron*, 17 Neb., 697.) It follows that the judgment of the district court is right and should be

AFFIRMED.

THE other judges concur.

GEORGE W. SPRAGUE V. FRANK C. FULLER ET AL.

FILED FEBRUARY 1, 1893. No. 4116.

Ejectment: PROOF OF ADVERSE POSSESSION: REVIEW. Evidence examined, and held to sustain the finding and decree of the district court.

ERROR from the district court of York county. Tried below before NORVAL, J.

George B. France and N. V. Harlan, for plaintiffs in error.

L. W. Osborn and W. H. Farnsworth, *contra*.

POST, J.

This was an action by the defendants in error in the district court of York county to recover possession of lot No. 5, in block No. 42, in the city of York. The issues in the district court involved the rights of numerous defendants, who claimed title to separate subdivisions of the lot above described, but the controversy in this court is limited to the north half thereof. It is conceded that the defendants in error have shown a perfect chain of title in themselves from the United States, their immediate grantor being D. N. Smith, who conveyed to them by warranty deed on the 16th day of July, 1871. The defense relied upon by the plaintiff in error is adverse possession in himself and grantors under color of title for more than ten years last preceding the commencement of the action. On the 14th day of September, 1874, the said lot 5 was sold for taxes by the treasurer of York county to James Wildish, to whom a certificate was issued in due form. On the 17th day of August, 1877, a treasurer's deed was executed to Polly Ann Richardson, assignee of said certificate, through whom plaintiff in error claims by means of certain *meane* conveyances. It is admitted by counsel for plaintiff in error that the treasurer's deed to Mrs. Richardson is void and insufficient to pass the title to the property in controversy, but it is claimed that it gives color of title and is sufficient to enable her and her grantees to avail themselves of the provisions of the statute of limitations as against the defendants in error. The last proposition may be con-

ceded, we think ; still, the judgment is right and must be affirmed. There is a clear failure of proof of adverse possession for the statutory period. It is true that Mrs. Richardson is shown to have resided upon lot 5 as early as July, 1877, but it is clear from her testimony that she never held or claimed the north half of said lot adversely to defendants in error. On her direct examination she says : "Why, I bought one-half of the lot from Mr. Moore, and he said at some future time I could sign it over to his wife, and he sent Mr. Penn and Ray to me to sign a deed, and I signed that deed before I knew what I was doing." It should be stated in this connection that the witness evidently refers to the assignment to her of the tax certificate above mentioned by Moore, who held by assignment from Wildish, the purchaser. It also appears that she conveyed the north half of said lot to William Penn and Charles Ray, through whom plaintiff in error claims, on the 1st day of September, 1877. Again, the witness says : "When I bought the whole lot I paid—if I bought the whole lot I was to pay \$60 for it, and if I only took half I paid \$30." Again, on cross-examination, she is asked :

Q. And you never received anything for it [the north half] ?

A. No, sir.

Q. Well, that is not an answer to the question ?

A. If I bought the north lot ?

Q. Yes.

A. I bought the north lot.

Q. And that you only claimed the south half ?

A. That is all I did claim or ever will.

We are satisfied from the evidence in the record that the agreement between the witness and Mr. Moore was that she should purchase a half of the interest of the latter in the lot by virtue of the tax certificate, and on the execution to her of a deed, by the treasurer, hold title to one-half of the lot in trust for him, and that the deed to Penn

and Ray was but the execution of said trust. The earliest date, therefore, from which plaintiff in error can claim adverse possession in his grantors is September 1, 1877, when Penn and Ray went into possession, under their deed above mentioned, and which is less than ten years prior to the commencement of the action.

2. It is argued that one of the defendants in error, Jones, did not authorize the bringing of the action. But the proof does not sustain said claim, even admitting it to be material under the issues. The testimony of Messrs. Osborn and Farnsworth, attorneys for defendants in error, who were examined by plaintiff in error, is to the effect that they have never had any communication with Mr. Jones, and did not know his residence; that the action was brought under the direction and employment of Mr. Fuller. The presumption is that the latter had authority to act in behalf of his co-plaintiff. The judgment of the district court is right and should be

AFFIRMED.

MAXWELL, CH. J., concurs.

NORVAL, J., not sitting.

UNION INSURANCE COMPANY OF CALIFORNIA V.
JOSEPH S. BARWICK,
AND
GERMAN-AMERICAN INSURANCE COMPANY OF NEW
YORK V. JOSEPH S. BARWICK.

FILED FEBRUARY 15, 1893. Nos. 5453, 5454.

1. **Fire Insurance: Assignment of Policy: Action for Loss: PROPER PARTY PLAINTIFF.** A business man having insured his stock of good for \$4,000, made a formal assignment of the

36	223
40	6
40	711
41	28
36	223
43	274
36	223
44	268
144	575

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policies with the consent of the insurers to one B, to secure a contingent liability as indorser on his notes. He also executed a chattel mortgage on his goods for the same purpose. The notes were paid by the maker and B. released from liability on the notes. In an action on the policies for a loss, *held*, that it was properly brought in the name of the insured.

2. ———: PROOF OF LOSS: WAIVER OF OBJECTIONS. Where proof of loss is furnished to the insurance company to which it objects, it must return the same with its objections within a reasonable time or its objections will be unavailing.
3. ———: ARBITRATION: PROVISION OF POLICY. A provision in a policy of insurance for arbitration is of no force where the insurance company denies its liability on the policy.
4. ———: CHANGE OF TITLE TO INSURED CHATTELS. A mortgage of chattels to secure a contingent liability of the mortgagee as indorsee and under which the mortgagee does not take possession is not such change of title as to avoid the policy.
5. ———: INSTRUCTIONS set out in the record *held* not prejudicial to the companies.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

Joseph S. Barwick brought suit against The Union Insurance Company of California and The German-American Insurance Company of New York, to recover upon their policies the amount of insurance written by each upon his wholesale stock of cigars and tobacco. The causes were tried together, and judgment rendered against each of the defendants. The companies prosecuted proceedings in error, and the cases were reviewed together upon the same record. *Judgments affirmed.*

Charles Offutt, for plaintiffs in error:

The petitions showed that Barwick had disposed of his title to recovery. He was not the real party in interest, and had no right to maintain either action in his own name. (Sec. 29, Code; *Lytle v. Lytle* 2 Met. [Ky.], 127.) The written assignment could not be changed by acts of

Barwick, and the action must be brought in the name of the assignee. (Sec. 29, Code; *Mills v. Murry*, 1 Neb., 327.) One is the real party in interest, and must bring the action in his own name, whenever a final judgment in an action brought by him would be a complete bar to any other action on the same demand by any other party. (Pomeroy, Remedies, secs. 128-129; *Killmore v. Culver*, 24 Barb. [N. Y.], 656-657; *James v. Chalmers*, 6 N. Y., 209-215; Hawes, Parties to Actions, sec. 34; *Hays v. Hathorn*, 74 N. Y., 486; Pomeroy, Remedies and Remedial Rights [2d ed.], secs. 126, 132; Bliss, Code Pleading, sec. 46.) This rule applies to insurance policies payable to mortgagee "as his interest may appear." (*Bonfant v. American Ins. Co.*, 76 Mich., 653; *Westchester Fire Ins. Co. v. Coverdale*, 48 Kan., 446; *Glover v. Wells*, 29 N. E. Rep. [Ill.], 680; *Fogg v. Ins. Co.*, 10 Cush. [Mass.], 346; *Southern Fertilizer Co. v. Reames*, 11 S. E. Rep. [N. Car.], 467; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y., 149.) There was a total failure to make and furnish proofs of loss called for by each policy. Furnishing proofs of loss was a condition precedent to suit. (*German Ins. Co. v. Fairbank*, 32 Neb., 750; *McCann v. Aetna Ins. Co.*, 3 Id., 207.) There was a total failure of proof on the question of arbitration. An award by arbitrators was a condition precedent to suit. (*Scott v. Avery*, 5 H. L. Cas. [Eng.], 811; *Viney v. Bignold*, 20 Q. B. D. [Eng.], 172; *Delaware & Hudson Canal v. Pennsylvania Coal Co.*, 50 N. Y., 250; *Wolff v. Ins. Co.*, 21 Vroom [N. J. Law], 453; *Hall v. Norwalk Ins. Co.*, 57 Conn., 105, 114; *Adams v. Ins. Co.*, 70 Cal., 198; *Carroll v. Girard Ins. Co.*, 72 Cal., 297; *Gauche v. Ins. Co.*, 10 Fed. Rep., 347; s. c. 4 Woods [U. S.], 102; *Hamilton v. Ins. Co.*, 136 U. S., 242; *Hutchinson v. Ins. Co.*, 26 N. E. Rep. [Mass.], 440; *Morley v. Ins. Co.*, 20 Ins. L. J. [Mich.], 581; *Gasser v. Sun Fire Office*, 42 Minn., 315; *Davenport v. Long Island Ins. Co.*, 10 Daly [N. Y.], 535.) The proofs of loss were not fur-

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nished. The requirement as to a certificate from a public officer is not less imperative than other conditions. (2 Phillips, Insurance, 472; *Woosley v. Wood*, 6 Term R. [Eng.], 710; *Ins. Co. v. Lawrence*, 2 Peters [U. S.], 25; *Gilligan v. Ins. Co.*, 87 N. Y., 626; *Ins. Co. v. Sennett*, 41 Pa. St., 161; *Mueller v. Ins. Co.*, 87 Id., 399; *Kelly v. Sun Fire Office*, 20 Ins. L. J. [Pa.], 407.) The pleadings alleged a performance of the conditions, not their waiver, and it was error to admit evidence tending to prove a waiver, or to instruct the jury as to what constituted a waiver. (*German Ins. Co. v. Fairbank*, 32 Neb., 753; *Phoenix Ins. Co. v. Bachelder*, Id., 493; *Livesey v. Omaha Hotel Co.*, 5 Neb., 50; *Lumbert v. Palmer*, 29 Ia., 108; *Eiseman v. Hawkeye Ins. Co.*, 74 Id., 11; *Baldwin v. Munn*, 2 Wend. [N. Y.], 399; *Oakley v. Morton*, 11 N. Y., 29; *Pier v. Heinrichoffen*, 52 Mo., 333.) The sufficiency of the proofs of loss was for the court, not the jury, to determine. (*Miller v. Ins. Co.*, 2 E. D. Smith [N. Y.], 268; *Klein v. Ins. Co.*, 13 Pa. St., 247; *Ins. Co. v. O'Neill*, 1 Atl. Rep. [Pa.], 592; *Ins. Co. v. Doll*, 35 Md., 89; *Ins. Co. v. Stibbe*, 46 Id., 302; *Neese v. Ins. Co.*, 55 Ia., 604; *Ins. Co. v. Shepard*, 12 S. E. Rep. [Ga.], 22; *Gauche v. Ins. Co.*, 10 Fed. Rep., 356.) The delivery of the key was a delivery of the goods. (*Chaplin v. Rogers*, 1 East [Eng.], 192; Benjamin, Sales [6th Am. ed.], 1043; 12 Am. & Eng. Encyl. Law, 519.) The chattel mortgage effected a change of title. (*Stewart v. Otoe Co.*, 2 Neb., 185; *Adams v. Nebraska City National Bank*, 4 Id., 373; *Marseilles Manufacturing Co. v. Morgan*, 12 Id., 69; *Ahlman v. Meyer*, 19 Id., 68; *Nelson v. Garey*, 15 Id., 535; *Loeb v. Milner*, 21 Id., 399; *Schumitsch v. American Ins. Co.*, 48 Wis., 30; *Western Massachusetts Ins. Co. v. Riker*, 10 Mich., 280; *Foote v. Phenix Ins. Co.*, 119 Mass., 259; *Farmers Ins. Co. v. Archer*, 36 O. St., 608; *Baldwin v. Phoenix Ins. Co.*, 60 N. H., 164; *Tallman v. Atlantic Fire Ins. Co.*, 3 Keyes [N. Y.], 87; *Olney v. German Ins. Co.*,

50 N. W. Rep. [Mich.], 100; *Lee v. Agricultural Ins. Co.*, 44 N. W. Rep. [Ia.], 683; *East Texas Fire Ins. Co. v. Clarke*, 15 S. W. Rep. [Tex.], 166.) What is a "material part" of a contract is a question of law, and the jury should have been instructed on that question. (*Oliver v. Hawley*, 5 Neb., 444; *Palmer v. Largent*, 5 Id., 223; Thompson, Trials, secs. 1395, 1950, 2187.) It was error to leave the question of waiver to the jury without stating what facts and circumstances would constitute a waiver. (*Estabrook v. Omaha Hotel Co.*, 5 Neb., 76; *Boehme v. Omaha Hotel Co.*, Id., 80.)

Talbot & Bryan, contra:

A policy of insurance is to be construed, if possible, so as to carry into effect the purpose for which the premium was paid and it was issued. (*Phœnix Ins. Co. v. Barnard*, 16 Neb., 90; *Springfield Ins. Co. v. McLimans*, 28 Id., 850; *German Ins. Co. v. Penrod*, 35 Id., 273.) Barwick is the real party in interest. An assignment as collateral security is not a "sale, transfer, or change of title," within the meaning of the policy. (*Ayers v. Hartford Ins. Co.*, 21 Ia., 193; *Hoagland v. Van Etten*, 22 Neb., 681.) The testimony shows that Barwick was always in possession. The giving of the chattel mortgage without a transfer of the property did not invalidate the policies. (*Byers v. Ins. Co.*, 35 O. St., 619; *Ins. Co. v. Spankneble*, 52 Ill., 53; *Aurora Fire Ins. Co. v. Eddy*, 55 Id., 213; May, Ins., sec. 269; *Quarrier v. Peabody Ins. Co.*, 10 W. Va., 507; *Judge v. Connecticut Fire Ins. Co.*, 132 Mass., 521; *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun [N. Y.], 98; *Hanover Fire Ins. Co. v. Conover*, 20 Brad. [Ill.], 297; *Nussbaum v. Northern Ins. Co.*, 37 Fed. Rep., 524; *Ins. Co. v. Gordon*, 68 Tex., 144; *Bryan v. Traders Ins. Co.*, 145 Mass., 389; *Hammell v. Queen's Ins. Co.*, 54 Wis., 72; *Loy v. Ins. Co.*, 24 Minn., 315; *Phœnix Ins. Co. v. Mutual Life Ins. Co.*, 101 Ind.,

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393; *Ins. Co. v. Grover & Baker Machine Co.*, 41 Mich., 131; *Marts v. Ins. Co.*, 44 N. J. L., 478; *Ins. Co. v. Jackson*, 83 Ill., 302; *Lane v. Ins. Co.*, 28 American Decisions, 154; *Humphry v. Ins. Co.*, 15 Blatchford [U. S.], 35; *Orrell v. Hampden Fire Ins. Co.*, 13 Gray [Mass.], 431; *Shepherd v. Union Fire Ins. Co.*, 38 N. H., 232; *Jackson v. Ins. Co.*, 23 Pick. [Mass.], 418; *Rice v. Tower*, 1 Gray [Mass.], 426; *Rollins v. Ins. Co.*, 5 Foster [N. H.], 200; *Jecko v. Ins. Co.*, 7 Mo. App., 308; *Savage v. Ins. Co.*, 52 N. Y., 502; *Van Dusen v. Charter Oak Ins. Co.*, 1 Rob. [N. Y.], 55; *McNamara v. Ins. Co.*, 47 N. W. Rep. [S. Dak.], 288.) The question of ownership by the insured is for the jury. (*Planters Mutual Ins. Co. v. Engle*, 52 Md., 468; *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. St., 521.) The companies by denying all liability dispensed with the necessity of furnishing proof of loss. (*Phenix Ins. Co. v. Bachelder*, 32 Neb., 494.) The companies denied liability, and it was therefore unnecessary to demand an award by arbitrators. (*Pratt v. N. Y. Central Ins. Co.*, 55 N. Y., 505; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md., 102; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. [N. Y.], 385.) Neither party demanded arbitration, and an award was for that reason unnecessary. (*Wright v. Susquehanna Mutual Fire Ins. Co.*, 20 Atl. Rep. [Pa.], 716; *Bailey v. Ætna Ins. Co.*, 46 N. W. Rep. [Wis.], 440.) Under an allegation of performance of a condition proof of a waiver is admissible without alleging the waiver. (May, Insurance, sec. 589; *Schultz v. Merchants Ins. Co.*, 57 Mo., 331; *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St., 568; *Levy v. Peabody Ins. Co.*, 10 W. Va., 560; *Smith v. Ins. Co.*, 33 Up. Can. Q. B., 70; *Russell v. State Ins. Co.*, 55 Mo., 592; *German Fire Ins. Co. v. Grunert*, 112 Ill., 69.) Parties are estopped from objecting to defective notice by a denial of liability and a failure to object to the sufficiency of the proof of loss, and by endeavoring with the insured to ascertain the amount of loss. (May, Ins., sec. 505; *Manhattan*

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Fire Ins. Co. v. Stein, 5 Bush [Ky.], 652; *Ligon's Adm'r v. Ins. Co.*, 87 Tenn., 341; *Ins. Co. v. Neve*, 2 McMullen [S. Car.], 237; *Lewis v. Ins. Co.*, 52 Me., 492; *Ins. Co. v. Schueller*, 60 Ill., 465; *O'Conner v. Ins. Co.*, 31 Wis., 160; *Grange Milling Co. v. Assurance Co.*, 118 Ill., 396.) The sufficiency of the proofs of loss and waiver were questions for the jury to pass upon. (*New Orleans Ins. Association v. Matthews*, 65 Miss., 301; *Chadbourne v. German-American Ins. Co.*, 31 Fed. Rep., 533; *Knickerbocker v. Gould*, 80 Ill., 388; *Edwards v. Baltimore Ins. Co.*, 3 Gill [Md.], 176; *Mercantile Ins. Co. v. Holthaus*, 43 Mich., 423; *Kramer v. People's Ins. Co.*, 14 Mo. App., 584; *O'Brien v. Phenix Ins. Co.*, 76 N. Y., 459; *McPike v. Western Assn. Co.*, 61 Miss., 37; *Solomon v. Metropolitan Ins. Co.*, 10 Jones & Sp. [N. Y.], 22; *Enterprise Ins. Co. v. Parisot*, 35 O. St., 35; *Lowry v. Lancashire Ins. Co.*, 32 Hun [N. Y.], 329; *Argall v. Old North State Ins. Co.*, 84 N. Car., 355; *Farmers Mutual Fire Ins. Co. v. Moyer*, 97 Pa. St., 441; *Crawford County Mutual Ins. Co. v. Cochran*, 88 Pa. St., 230; *Miller v. Germania Fire Ins. Co.*, 13 Phila. [Pa.], 551; *Todd v. Aetna Ins. Co.*, 2 W. N. C. [Pa.], 227; *Fawcett v. Ins. Co.*, 27 Up. Can. Q. B., 225; *American Fire Ins. Co. v. Hazen*, 17 W. N. C. [Pa.], 249.) The trial court stated what facts constitute a waiver, and it was proper to leave it to the jury to say what facts were proved. (*Dreyfus v. Aul*, 29 Neb., 197.)

MAXWELL, CH. J.

On the 12th day of January, 1890, the defendant insured "his wholesale stock of cigars, cigarettes, snuffs, pipes, and all kinds of tobacco, including packages, cases, and boxes containing same, and other merchandise usually kept by wholesale tobacconists, all of which contained in the second story and basement, brick, composition roof, building, situate on lot A of subdivision of lots 11 and 12, block 33, Lincoln, Nebraska," with each ot

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the plaintiffs in error for the sum of \$2,000, said policies to continue in force for one year. On the 17th of February, 1890, the stock of goods, then alleged to be of the value of \$6,500, was badly injured by fire, the loss claimed being \$5,000. After the loss the adjusters of both of the insurance companies named appeared and examined the goods, but seem to have failed to make an adjustment of the loss, hence the defendant in error brought an action in the district court of Lancaster county upon both policies. The cases were tried together, and the jury returned a verdict in favor of the defendant in error and against each company for the sum of..... \$1,750 00
 With interest at seven per cent..... 140 87

 \$1,890 87

And a motion for a new trial having been overruled, judgment was entered on the verdict.

Four errors are relied upon by the plaintiffs in error to secure a reversal of the case. These will be noticed in their order.

"1. That the plaintiff was not the real party in interest, as he had assigned his interest in the goods."

The testimony shows that C. C. Burr, of Lincoln, had befriended the defendant in error and among other things had indorsed his notes for considerable sums at the First National Bank of Lincoln. Burr seems to have asked for no security, but the defendant in error, to protect him from possible loss, assigned the policies with the assent of the companies to him, "as his interest should appear," and also executed a chattel mortgage on a part or all of his goods to Burr to secure the same contingent liability. There was no change of possession, and the defendant in error paid the notes in question and released Burr from liability thereon. He (Burr) was a witness on the stand and disclaims any right, title, or interest in the goods in question. It also appears that the defendant in error is

the only party who has any right or title to the property. The defendant in error, therefore, is the real party in interest, and the first error assigned is not well taken.

"2. That two conditions precedent were not complied with, viz., proof of loss and submission to arbitration."

The propositions are considered together in both briefs, but we will consider them separately.

1. The proof shows that both companies were notified of the loss immediately after it occurred; that an adjuster appeared and with the defendant in error took an account of the goods and personally saw and inspected the injured goods, and seems to have obtained a pretty accurate view of the condition of the stock before the fire. The principal object of proof of loss is to obtain a correct statement from the owner of the property injured or destroyed, of the amount of the loss and the date of its occurrence. Other things are required in the proof, but they are subsidiary to the main statements. If objections are made to the form of the proof they should be communicated to the insured and he should be required to make out a full statement; otherwise the objections will be unavailing. A company may have notice from their own agent at a given point that a certain loss has occurred, and if it acts upon that information and sends an adjuster to estimate the amount of the same, etc., it is no doubt a waiver of proof.

We find the following letter in the record:

"OMAHA, NEB., 31st March, '90.

"*J. S. Barwick, Esq., Lincoln, Neb.*—DEAR SIR: I am in receipt of a paper containing a list of goods said to have been damaged by fire on February 17, 1890, which are alleged to have been insured under policy 1313 of the German-American Insurance Company, said paper being signed and sworn to by you.

"If we are correctly informed you parted completely with the title of all goods which may have been covered by any policy of ours on February 4, 1890, and have not

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since become the owner of any such goods, consequently we fail to recognize any liability towards you.

"Respectfully,

FRANCIS DANA,

"*Special Agent.*"

In the case at bar the testimony shows that proof of loss was made, to which no objections were taken, and it is now too late.

2. The Union Insurance Company's policy contains this provision: "The amount of sound value and of loss or damage shall be determined by agreement between this company and the assured, but if differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing, except the validity of the contract or the liability of this company, concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement; and the award, in writing, of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted." There is no claim that either party desired to arbitrate the matters in difference between them, and hence the provision has no force. In the German Insurance policy there is no provision for arbitration. That provision, however, is inserted in a policy for the purpose of having the amount of the loss adjusted in an amicable manner, where, in fact, the insurance company admits its liability, but is uncertain as to the amount of the loss. If the company denies its liability for the loss there would be nothing from its standpoint to arbitrate. Hence, the rule does not apply where the company denies its liability. (*German-Am. Ins. Co. v. Etherton*, 25 Neb., 505.) In the case cited it was held that a provision of the kind named in a policy was void, the effect being to oust the courts of their legitimate jurisdiction. The second objection is not well taken.

3. The third error assigned is that the proofs of loss were not sufficient, and were for the court and not the jury to pass upon. We do not care to comment further upon the proofs of loss. They were sufficient to notify the companies and they acted upon such notice, but refused to pay the loss. If the proofs were defective the defects were waived.

4. The fourth error is in refusing to hold that the chattel mortgage referred to did not avoid the policy. It is now well settled that a mortgage of chattels, where there is no change of possession, will not avoid a policy of insurance.

In *Byers v. Farmers Ins. Co.*, 35 O. St., 606, the fifth point in the syllabus is as follows: "It was a condition of the policy, that 'if the property be sold or transferred, or any change take place in the title, either by legal process or otherwise, * * * without the consent of the company, the policy shall be void.' This condition was not broken by the execution of a mortgage on the property without such consent." (See, also, *Commercial Ins. Co. v. Spankneble*, 52 Ill., 53; *Aurora Fire Ins. Co. v. Eddy*, 55 Id., 213; *May, Ins.*, sec. 269, and cases in note; *Quarrier v. Peabody Ins. Co.*, 27 Am. Rep., 582; *Bryan v. Traders Ins. Co.*, 145 Mass., 389.)

In *Hammel v. Queen's Ins. Co.*, 54 Wis., 72, 11 N. W. Rep., 351, it is said: "In *Strong v. Ins. Co.*, 10 Pick., 40, it was held that a condition in the policy which provided, 'that if the property should be sold or conveyed in whole or in part the policy should be void,' was not broken by a sale upon execution and that the provision in the policy referred only to voluntary assignments. (See, also, *Smith v. Putnam*, 3 Pick., 221; *Doe v. Carter*, 8 Term R., 57; *Stetson v. Ins. Co.*, 4 Mass., 330; *Franklin Ins. Co. v. Findley*, 6 Whart., 483; *Wood, Ins.*, sec. 326; *Baley v. Ins. Co.*, 80 N. Y., 21; *Barlow v. Ins. Co.*, 63 Id., 399; *Commercial Ins. Co. v. Spankneble*, 52 Ill., 53; *Starkweather v. Ins. Co.*, 2 Abb.

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[U. S. C. C.], 67.) These cases and numerous others that might be cited seem to settle the question that the condition prohibiting a sale, transfer, or conveyance of the insured property is to be construed as limited to a voluntary transfer, and not to a sale or transfer made by adverse legal proceedings. In all these and similar cases it is probable that if an adverse legal sale, transfer, or conveyance of the insured property had been made previous to the loss, so as to divest the insured of all right, title, or interest therein, no recovery could be had for want of an insurable interest in the policyholder at the time of the loss."

It is also said (11 N. W. Rep., 355): "In the following cases it is held that executory contracts for the sale of the insured property do not avoid the policy under similar conditions: *Ins. Co. v. Lawrence*, 4 Metc. [Ky.], 9; *Martin v. Ins. Co.*, 11 Barb. [N. Y.], 624; *Clinton v. Ins. Co.*, 45 N. Y., 454; *Phillips v. Ins. Co.*, 10 Cush., 350; *Hill v. Ins. Co.*, 59 Pa. St., 474; *Washington v. Ins. Co.*, 32 Md., 421; *Jackson v. Ins. Co.*, 16 B. Mon. [Ky.], 224; *Power v. Ins. Co.*, 19 La., 28; *Hutchinson v. Wright*, 25 Beav., 444. The last case was a marine insurance, and before loss the assured transferred his interest to a third person by an absolute conveyance, and his vendee was entered as owner on the register; but upon the trial it was proved that the transfer was in fact a mortgage. The defendant insisted the policy was avoided under two provisions of the association. The first was that if the ship was sold, the risk should cease from the date of the sale, unless notice was given to the secretary. No notice of sale or mortgage either was given to the secretary. The other provision was, 'that no vessel which is mortgaged shall be insured, unless the mortgagee give a written guarantee,' etc. No such guarantee had been given. It was held the plaintiff could recover, notwithstanding the form of his conveyance, upon proof that it was intended as a mortgage in fact; and, second, that the mortgage given after the in-

insurance was not a violation of the second provision. It seems to us that the words used in the condition in this policy clearly look to such a sale, transfer, or alienation as passes the title and carries with it the right of possession. Such is the definition of the words 'sold,' 'transferred,' 'alienated'; and, if they are made to include a sale upon execution, it is by giving them a meaning which they do not ordinarily receive. The added words, 'change in the title or possession,' do not extend the meaning. It is the title to the estate which is to be changed, not a mere right which may or may not ripen into a change of title." These cases and many others which might be cited show that a mere security does not transfer the title and defeat a recovery for loss. The fourth point, therefore, is not well taken.

5. The fifth error assigned is in giving the fourth paragraph of the instruction, which is as follows: "You are instructed that the insurance policies issued by defendants to plaintiff constitute contracts in writing between the insurer and insured, equally binding upon each party to the agreement; and if it appears that either party to the agreement has failed to comply with the terms thereof in any material part, then the party so failing cannot insist upon the performance of the agreement by the other party, unless you should further find that compliance with the agreement on the part of the party failing had been waived by the other party." It must be confessed that the particular object of this instruction is not apparent. It seems to be an indirect mode of saying to the jury that if they found that the plaintiff below had not complied with the conditions of the policy in any respect, then he could not recover. It is evidently directed at the plaintiff below, and was prejudicial to him, and the attorney for the companies does not contend that it was prejudicial to them. The other instructions are not objected to, and are presumed to be correct. Upon the whole case it is apparent that the plaintiff below is entitled to recover, and no real

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defense has been shown to the action. A contract of fire insurance is one of indemnity in case of loss or damage by fire. Like any other contract, it should be sustained if possible. Where there has been an actual loss without fault of the accused it should be adjusted and paid with reasonable promptness. That is the contract; and there is no justice in contending in court for years against a just claim in order to secure a compromise or diminution in the amount. There is nothing in this record that tends to impeach the good faith of the defendant in error, and so far as appears his claim is just. The judgment is

AFFIRMED.

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THE other judges concur.

LANNING, ANTRAM & COMPANY V. JOSEPH BURNS.

FILED FEBRUARY 15, 1893. No. 4895.

Negotiable Instruments: ACTION ON CHECK WHERE PAYMENT WAS STOPPED: PARTIAL FAILURE OF CONSIDERATION. In an action against the drawer of a negotiable check who had stopped payment of the same, the defendant in his answer admitted that a portion of the amount was due the payee, but alleged that there was partial failure of consideration. *Held*, That upon the pleadings the plaintiff could recover the amount admitted to be due, and that a judgment for the defendant could not be sustained.

2. ——— : ——— : **BONA FIDE PURCHASER: DEFENSE.** In an action between the parties on a negotiable instrument and persons not *bona fide* purchasers for value before maturity a partial defense is available.

3. ——— : ——— : ——— : **NOTICE.** If the plaintiffs are *bona fide* purchasers without notice they are entitled to protection.

ERROR from the district court of Lancaster county.
Tried below before CHAPMAN, J.

A. G. Greenlee, and Marquett, Deweese & Hall, for plaintiff in error.

Pound & Burr, contra.

MAXWELL, CH. J.

This is an action upon a check given by the defendant. On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered. It is claimed by the plaintiff that on the issues made by the pleadings the plaintiff is entitled to recover and that the judgment cannot be sustained. The petition is as follows:

"The plaintiff complains of the defendant and says that it is a corporation organized and existing under and by virtue of the laws of the state of Kansas, and doing business as bankers in said state; that on the 31st day of January, 1889, this defendant executed, signed, and delivered to George H. Allen a check on the Lincoln National Bank of Lincoln, Neb., for \$163.12, payable to the said George H. Allen, or order. On the same day said check was by the said George H. Allen, for a valuable consideration, and in the due course of business, assigned to Kerndt Brothers, and was by them for a valuable consideration, and due course of business, and without notice, assigned to this plaintiff, and that afterwards the said Joseph Burns, without any right or authority so to do, stopped the payment of said check, to the damage of this plaintiff in the sum of \$163.12.

"2. On the 4th day of February, 1889, said check was protested for non-payment, and the costs of protesting the same are \$3.29.

"Wherefore plaintiff prays judgment against said defendant for the sum of \$163.12 with interest from the 31st day of January, 1889, and \$3.29 with interest from the 4th day of February, 1889, and costs of suit."

To this petition the defendant filed an answer as follows:

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"Now comes the defendant, Joseph Burns, and for answer to the petition of the plaintiff filed herein says: He admits that the plaintiff is a corporation organized and existing under and by virtue of the law of the state of Kansas and doing business as bankers in said state; that on the 31st day of January, 1889, defendant executed, signed, and delivered to George H. Allen a check on the Lincoln National Bank of Lincoln, Nebraska, for \$163.12, payable to the order of said George H. Allen; admits that on the same date said check was by the said George H. Allen for a valuable consideration assigned to Kerndt Brothers, and by them for a valuable consideration assigned to plaintiff, and that afterwards the defendant stopped the payment of said check; admits that said check was on the 4th day of February, 1889, protested for non-payment. And defendant denies each and every allegation in said plaintiff's petition contained; that said check was given said Allen on said 31st day of January, 1889, by defendant at Bird City, Kansas, in the conditional payment of a balance of account between defendant and said Allen; that said Allen so took said check upon the express condition that payment of the same would be stopped by defendant, if upon reaching his office and books he should find that the representations made by said Allen to obtain said check were untrue, and that the consideration, or a part of the consideration thereof, had failed; that the representations made to this defendant by said Allen were untrue; that the consideration for the same failed to the amount of \$100, and that said check was obtained by fraud upon this defendant; that the plaintiff and said Kerndt Brothers had due, actual, and legal notice that said check was given by defendant and accepted by said Allen upon said condition, and that payment of the same was liable to be stopped, and defendant says that plaintiff took said check with such notice; that C. L. Antram is the cashier of the plaintiff and that Morris Kerndt is a member of the firm of Kerndt Brothers, and was, on

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said 31st day of January, 1889, the city treasurer of said Bird City, Kansas.

"Wherefore the defendant prays that the plaintiff's appeal in this case may be dismissed, and that defendant may go hence and recover his costs."

The reply denies the new matter set forth in the answer and that there was any fraud or misrepresentation. The original check, with the indorsements thereon, was introduced in evidence and is as follows:

"24066.	LINCOLN, NEB., Jan. 31, 1889.	No. ———
	"Lincoln National Bank,	3 29
	"Pay to G. H. Allen, or order,	\$163 12
one hundred and sixty-three $\frac{1}{10}$ dollars.		—————

Count \$166 41

"JOSEPH BURNS."

It is indorsed as follows: "G. H. Allen. Kerndt Brothers. Pay to A. Yeazel, cashier, for collection account of Lanning, Antram & Co., Bird City, Kansas. C. L. Antram, cashier. Pay C. T. Boggs, cashier, or order, for account of Exchange National Bank, Hastings, Neb. A. Yeazel, cashier."

It will thus be seen that defendant really pleads a failure of consideration to the amount of \$100, and in effect admits the remainder of the debt. Therefore, if the action was between the original parties, the plaintiff, upon the pleadings, would be entitled to recover a portion of the claim. The rule is thus stated by Daniel, 1 Neg. Inst., sec. 201: "Whenever the defendant is entitled to go into the question of consideration, he may set up the partial as well as the total want of consideration. Thus, where the drawer of a bill for £19 5s., payable to his own order, sued the acceptor, and it appeared that the bill was accepted for value as to £10 only, and as an accommodation to the plaintiff as to the residue it was held that although with respect to third persons the amount of the bill might be £19 5s., yet as between these parties it was an accept-

ance to the amount of £10 only. So, where a note was given by A to B for the sum of £32 6s. 10d., upon B's representation and assurance that that amount was due, whereas A owed B £10 14s. 11d., and no more, the note was held good only for the amount that was actually due. So, where a father gives his son a note partly for services and partly as a gratuity, the partial want of consideration might be pleaded as to such portion of the amount as was gratuitous; and it would be no objection that no distinct amount was fixed upon as compensation for the services, but it would be for the jury to settle what amount was founded on the one consideration, and what on the other." (Thompson, Bills [Wilson's ed.], 64; Byles, Bills [Sharwood's ed.], 239; *Darnell v. Williams*, 2 Stark. [Eng.], 166 [3 E. C. L. R.]; *Barber v. Backhouse*, 1 Peake [Eng.], 86; *Clark v. Lazarus*, 2 M. & G. [Eng.], 167; *Forman v. Wright*, 11 C. B. [Eng.], 481.) The words of the plea, "fraudulently and deceitfully," were rejected as surplusage. (*Parish v. Stone*, 14 Pick. [Mass.], 198.) In addition to this there is testimony in the record tending to show that the plaintiff is a *bona fide* holder, and as such entitled to protection. As there must be a new trial, we will not discuss the facts. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

C. GEE WO v. STATE OF NEBRASKA.

36 241
046 161

FILED FEBRUARY 15, 1893. No. 5485.

1. **Information: NEGATIVE AVERMENT OF PROVISIO IN STATUTE.**

In charging an offense under a statute the general rule is that a negative averment of the matter of a proviso is not required in an information, unless the matter of such proviso enters into and becomes a part of the description of the offense, or is a qualification of the language defining or creating it.

2. ——— : ——— : **PHYSICIANS: PRACTICE IN VIOLATION OF LAW.**

Where, however, the matters of the proviso point directly to the character of the offense, or where the statute includes two or more classes which will be affected thereby, such as physicians who remove into the state to practice after the passage of an act to regulate the practice of medicine, and persons who were residing in the state and practicing under a former act, in such cases the information must show on its face that the accused does not belong to either class.

3. **Statutes: ACT CREATING STATE BOARD OF HEALTH.** Act held to be within the power of the legislature, and in its general scope not in conflict with the constitution.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

W. S. Shoemaker, for plaintiff in error.

George H. Hastings, Attorney General, and *Jacob Fawcett*, for the state.

MAXWELL, CH. J.

The plaintiff in error was convicted of practicing medicine in the state without lawful authority so to do as provided in the act of 1891, to establish a state board of health, and to regulate the practice of medicine in the state of Nebraska, and was sentenced to pay a fine and costs. The act of 1891 superseded the law of 1881. It

Gee Wo v. State.

appears from the record that the plaintiff in error in 1889 had filed the statement and affidavit required by the law of 1881, and was practicing under that law when the act of 1891 took effect. The first error alleged is that the information fails to charge an offense. It is as follows:

"THE STATE OF NEBRASKA, }
COUNTY OF DOUGLAS. } ss.

"Of the May term of the district court of the 4th judicial district of the state of Nebraska, within and for the county of Douglas and state of Nebraska, in the year of our Lord 1892. I, Timothy J. Mahoney, county attorney in and for the county of Douglas, in said state of Nebraska, who prosecutes for and in behalf of said state in the district court of said district, sitting in and for said county of Douglas, and duly empowered by law to inform of offenses committed in said county of Douglas, come now here in the name and by the authority of the state of Nebraska, and give the court to understand and be informed that on the 29th day of March, A. D. 1892, C. Gee Wo, late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being, then and there did unlawfully practice medicine, surgery, and obstetrics, and the branches thereof, without first having obtained and registered a certificate from the state board of health authorizing him, the said C. Gee Wo, to practice medicine, surgery, and obstetrics as required by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

Section 9 of the act of 1891 is as follows: "It shall be the duty of all persons intending to practice medicine, surgery, and obstetrics in the state of Nebraska, before beginning the practice thereof in any branch thereof, to present his diploma to said board, together with his affidavit that he is a lawful possessor of the same, that he has attended the full course of study required for the degree of M. D.,

and that he is the person therein named. Such affidavit may be taken before any person authorized to administer oaths, and the same shall be attested under the hand and official seal of such official, if he has a seal, and any person swearing falsely in such affidavit shall be guilty of perjury, and subject to the penalty therefor."

Section 11 is as follows: "All physicians who shall be engaged in practice at the time of the passage of this act shall, within six months thereafter, present to said board their diplomas and affidavits as hereinbefore provided, or, in the case of persons not graduates who were entitled to registration and practice under the provisions of the act entitled 'An act to regulate the practice of medicine in the state of Nebraska,' approved March 3d, 1881, on affidavit showing them to have been entitled to so register and practice, and a certified transcript of their registration under said act, and upon their doing so shall be entitled to the certificate herein provided, which they shall file with the county clerk as herein provided; *Provided*, That no one having the qualifications required in, and having complied with, said act of March 3d, 1881, shall be liable to prosecution for failure to comply with this act until the expiration of said period of six months."

It will be observed that there are two classes of persons entitled to registration. First, those who are about to begin the practice of medicine in the state; and second, persons already engaged in the practice under the act of 1881, when the act of 1891 took effect.

In *State v. Phippin*, 70 Mich., 11, the defendant was arrested for unlawfully advertising and holding himself out to practice medicine. The act of 1883, under which the defendant was arrested and tried, prescribed the necessary qualifications to practice medicine in the state as follows:

"The necessary qualifications to practice medicine in this state shall be: 1. That every person who shall have actually practiced medicine continuously for at least five

years in this state, and who is practicing when this act shall take effect, shall be deemed qualified to practice medicine in this state, after having registered in the office of the county clerk as provided by this act. 2. Every graduate of any legally authorized medical school in this state, or in any one of the United States, or in any other country, shall be deemed qualified to practice medicine and surgery in all its departments after having registered as provided by this act; *Provided*, That the provisions of this act shall not be construed so as to prohibit any student or under-graduate from practicing with and under the instruction of any person legally qualified to practice medicine and surgery under and by the provisions of this act; *Provided*, That every person qualified to practice medicine and surgery under the provisions of this act shall, within three months after this act shall take effect, file with the county clerk of the county wherein he has been engaged in practice, or in which he intends to practice, a statement sworn to, setting forth: 1. If he is actually engaged in practice in said county, the length of time he has been engaged in such continuous practice, and if a graduate of any medical college, the name of the same, and where located."

The substance of the information in that case is as follows: "That on the 29th day of June, and between that day and the day of making this complaint (July 28th), at the city of Cedar Rapids, in the county of Kent, one William W. Phippin did then and there advertise and hold himself out to the public as authorized to practice medicine, and did practice medicine in the city, county, and state aforesaid, without having the qualification required by law so to do, to-wit, he (the said William W. Phippin) not having practiced medicine continuously for five years in this state and he (the said William W. Phippin) not being a graduate of any legally authorized medical college in said state, or in any of the United States, or in any other country, against the forms of the statute," etc.

It will be observed that the Michigan statute, like that of this state, provides for two classes of persons who may practice medicine, and the information shows on its face that the defendant belonged to neither class and therefore was not authorized to practice medicine in the state. Mr. Bishop, in *Directions and Forms*, sec. 999, has given a somewhat similar form against an unlicensed physician. It is claimed on behalf of the state that the second class is a mere exception and therefore need not be negatived. Mr. Chitty, *Cr. Law*, vol. 1, 232, in speaking of exceptions, says: "And it is never necessary to negative all the exceptions which by some other statute than that which creates the offense might render it legal, for these must be shown by defendant for his own justification. Thus, an indictment for a misdemeanor against a receiver of stolen goods need not aver that the principal has not been convicted. And in general all matters of defense must come from the defendant and need not be anticipated by the prosecutor; nor is it necessary for him to negative the commission of a higher offense. So it is never necessary to state the conclusion of law to be derived from the premises, but merely to state the facts and leave the court to draw the inference." (*Rex v. Pemberton*, 2 Burr. [Eng.], 1036; *King v. Reynolds*, 1 Wm. Bla. [Eng.], 230; *King v. Baxter*, 5 T. R. [Eng.], 84; *King v. Higgins*, 2 East T. R. [Eng.], 19, 20.) Thus, in an indictment for disobedience of a justice's order it need not be averred that the order was not revoked, nor is it necessary to negative the commission of a higher crime. (*Rex v. Higgins*, 2 East T. R. [Eng.], 5-20; 1 Bish., *Cr. Pro.*, sec. 513.) From an examination of all the cases the true rule appears to be, a negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment or information, unless the matter of such exception or proviso enters into or becomes apart of the description of the offense, or a qualification of the language defining or creating it. Therefore the proviso in the stat-

Gee Wo v. State.

ute excepting from its operation those persons who conscientiously observe the seventh day of the week as the Sabbath, instead of the first, need not be referred to. The reason is, the proviso is not a part of the description of the offense, but is in the nature of a personal privilege—to keep the seventh day of the week as the Sabbath in the place of the first, but whether the defendant is entitled to the benefit of the proviso must be determined from the evidence. A different rule prevails, however, where the matter of the proviso points directly to the character of the offense, and is made a material qualification of the statutory description of it, as in an indictment for selling liquor, where the proviso was, “‘That nothing contained in this section shall be so construed as to make it unlawful to sell any spirituous liquors for medicinal and pharmaceutical purposes.’ In such case the indictment or information must contain the negative averment that the sale of the liquor was not for medicinal or pharmaceutical purposes.” (*Hirn v. State*, 1 O. St., 16; *Billigheimer v. State*, 32 Id., 435; *Maxw., Cr. Pro.*, 477.) Applying these rules to the information in question and it fails to show that the plaintiff in error belongs to either of the principal classes set forth in the statute, and is therefore insufficient. It is unnecessary, therefore, to examine the evidence.

2. It is claimed on behalf of the plaintiff in error that the act is in conflict with the constitution. The general power of the state to provide that only persons skilled in the healing of diseases shall hold themselves out to the public as physicians is undoubted.

This power cannot be used to build up any particular school of medicine, but is designed to permit only those qualified by education and good moral character to engage in the business. Even with the utmost care upon the part of the state it may well be questioned if some of the medical schools are as thorough as they should be. The relation between the physician and the patient is necessarily

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confidential. If a person is afflicted with some ailment, or some member of his family is sick, and he calls to his aid a physician, he has a right to expect the ordinary degree of skill and care. His restoration or that of his loved ones—nay, life itself—may depend upon the skill, attention and good judgment of the physician. No one, therefore, should be permitted to practice who has not the necessary diploma, or has been in actual practice in the state for the time prescribed by statute. The board, however, is not to use its power arbitrarily nor to refuse a certificate in a proper case, nor to attempt to build up any particular system. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD
COMPANY V. JOSEPH J. POUNDER.

86	247
47	776
36	247
151	481

FILED FEBRUARY 15, 1893. NO. 4907.

1. **Railroad Companies: NEGLIGENCE: FENCES: GATES AT FARM CROSSINGS.** Under the statute, where a railway has been in operation in any county of the state for six months, it is its duty to erect and maintain on the sides of its road, except at crossings of public roads and within the limits of cities and villages, suitable and amply sufficient fences to prevent cattle, horses, etc., from getting on the railroad. Gates at farm crossings are a part of the inclosure of the railroad and must be suitable and amply sufficient to prevent stock from getting on the track.
2. ———: ———: **ACTION TO RECOVER VALUE OF STOCK INJURED AND KILLED ON THE TRACK.** *Held*, That the petition states a cause of action.

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3. ———: NEGLIGENCE IN MAINTAINING GATEWAY AND IN HANDLING TRAINS: EVIDENCE: INSTRUCTIONS set out in the opinion are not erroneous.
4. ———: ———: ———: INSTRUCTIONS set out in opinion *held* properly refused.

ERROR from the district court of Seward county. Tried below before BATES, J.

John B. Hawley and *D. C. McKillip*, for plaintiff in error.

Norval Bros. and Lowley, contra.

MAXWELL, CH. J.

This is an action to recover the value of a horse of the defendant in error which was killed, it is alleged, by the fault of the plaintiff in error, and for injuries to another horse in the amount of \$25. On the trial of the cause the jury returned a verdict in favor of the defendant in error for \$140, with interest at seven per cent for one year and four months, and judgment was rendered thereon. There are four errors assigned in the brief of the plaintiff in error for a reversal of the case:

1. That the petition does not state a cause of action.
2. The court erred in giving instruction No. 8.
3. The court erred in giving instruction No. 1.
4. The court erred in refusing to give defendant's instructions 1, 1½, and 2 asked by the plaintiff in error.

The errors assigned will be considered in their order.

The petition is as follows: "The plaintiff complains of the defendant, for that said defendant is a corporation organized under the laws of the state of Nebraska; that on or about the 31st day of December, 1889, the defendant was operating a railroad through Seward county, said road being opened for use and used for more than six months in said county; that said railroad of defendant runs through

plaintiff's land on which he lives; that the line of road through the plaintiff's land is fenced, and is fenced for more than half a mile southwest on an adjoining piece of a large draw where there is a bridge of at least 100 feet in length, on which said road is built; that said bridge is not planked on the ties, but is left open, and the fence of said defendant's road runs up to and is fastened to the northeast end of said bridge, said bridge being from ten to twenty feet high from the ties to the ground; that the defendant when it fenced said road through plaintiff's land put in a gate on plaintiff's land to enable him to cross over its track from one side of his farm to the other, but said gate and fence were so poorly made and improperly constructed, with no fastenings of any kind to prevent the wind from blowing it open, and said defendant negligently and carelessly suffered and permitted the said gate and fence to be out of repair, and all of which facts the defendant had due notice, and negligently failed and neglected to repair, fix, fasten, and properly construct the same; that at the date last aforesaid the plaintiff's horses, grazing in plaintiff's pasture on the land aforesaid adjoining defendant's track, passed through the aforesaid defectively constructed and insufficiently secured gate upon the right of way of defendant, and the defendant while so operating its road as aforesaid, by its passenger train going southwest at the time and place aforesaid, by its agents and servants so running said passenger train as aforesaid, saw said plaintiff's horses upon its right of way and road bed of defendant close to the northeast end of the aforesaid bridge; that said train was stopped about 150 feet before reaching the bridge; that at the time said train stopped, the section men of defendant were endeavoring to drive said horses from the bridge toward and past the engine and passenger coaches, and before said horses could be driven up to and past said engine and cars aforesaid the defendant, by its servants and employes, negligently and carelessly started said engine and

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cars aforesaid without giving said sectionmen time to get said horses past said engine and cars aforesaid, two of said horses being already scared and frightened were, by the carelessness and negligence of the defendant in starting its engine and cars aforesaid, driven into said bridge, whereby one of said horses was so injured that it died, and the other was greatly injured and damaged, to the plaintiff's damage of \$150. Wherefore the plaintiff demands judgment for the sum of \$150 and costs of this suit."

It will be observed that the plaintiff below states two grounds for a recovery. First, that the gate was insufficient and known to be such; and second, negligently frightening the horses so that they ran upon the bridge and were injured. The act of June 22, 1867, provides that the railway company "shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroads, or the part thereof so open for use, suitable and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways and within the limits of towns, cities, and villages, with openings or gates or bars at all the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroad, and shall also construct, where the same has not already been done, and hereafter maintain at all road crossings, now existing or hereafter established, cattle guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on to such railroad, and so long as such fences and cattle guards shall not be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, are not in sufficiently good repair to accomplish the objects for which the same is herein prescribed is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any

such corporation, or by the locomotives, engines, or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards shall have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done.

"Sec. 2. Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof, against all live stock running at large at all points, shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employes, or engines, or by the agents, employes, or engines belonging to any other railroad company or person, running over or upon any such road or there being."

It is the duty of a railroad company to erect "suitable and amply sufficient gates at all farm crossings." We think sufficient is alleged to show that the gate in question did not conform to the statutory requirements and the proof fully sustains the allegations of the petition. The first objection is overruled.

2. The testimony tends to show that the railway in question runs through the lands of the defendant in error for a considerable distance; the railway company put in a farm crossing for him across the track with gates; that the gates are about eighteen feet in length and consist of four boards six inches in width and about seven-eighths of an inch in thickness. There are three cross-pieces to each gate, viz., one at each end and one in the middle. There were no hinges—the gates being held in place by an upright and cleats at each end. The testimony also shows that the railway fence at that place consists of four barbed wires; that the posts were not well braced and by reason of tightening the wires the posts were drawn out of perpendicular line, the effect of which was to render the gate too short

for the aperture and render it liable to be blown open by the wind. There is testimony also tending to show that the section boss had been notified of the condition of the gate and requested to fix the same. This, however, he denies. On December 31, 1889, the gate in question was blown open and the defendant in error's horses, which were in his pasture, escaped through the gateway onto the railway track, and were injured.

The instructions objected to are as follows: "If you find from the evidence that defendant, when it fenced its road through plaintiff's land, put in a gate, but so negligently and carelessly kept up and maintained such gateway across its right of way that plaintiff's horses passed through such gateway upon said defendant's right of way and railroad and were killed or injured in consequence thereof, then you should find for plaintiff." This conforms to the proof. The company is required to "erect and maintain fences on the sides of the railroad suitable and amply sufficient to prevent cattle, horses, sheep, and hogs" from getting on said railroad. A gate is a part of a railway fence and like it must be sufficient for the purpose indicated. There was no error therefore in the giving of this instruction.

3. The first instruction is as follows: "The jury are instructed that the plaintiff brings this action to recover the sum of \$150 against the defendant, for, on the 31st day of December, 1889, defendant then, by its servants and employes, negligently and carelessly causing one of said plaintiff's horses to be killed and another to be injured and damaged, such horses being upon the defendant's right of way at the time, and going thereon through a gateway across such right of way, which plaintiff alleges was kept in such negligent manner that such gate was left open so as to permit such horses to pass in upon said defendant's right of way, and that being thereon, defendant, by its servants and employes, negligently and carelessly started

their engine and cars, and their passing upon such railroad then frightening such horses so that they were driven into defendant's bridge." It will be observed that the instruction conforms to the cause of action as set forth in the petition, and there was no error in giving the same.

4. The instructions asked by the railway company and refused are as follows:

"The jury are instructed that under the statutes and laws of this state the defendant railroad company cannot be held liable for any injury done to plaintiff's horses on the ground of negligence of defendant in not having or keeping the fence on the sides of its road, or any part thereof, or any gates therein, in sufficiently good repair to prevent horses from getting on its said railroad, or for any defect in said fence or gates alone, unless you find that the alleged injury to said horses was caused by actual collision with defendant's locomotive, engine, or trains.

"1½. You are instructed that under the statutory law of this state, to make a railroad company liable for injury to stock for want of a fence, or for want of a sufficient fence such as the law requires the company to erect and maintain to inclose its track, the injury to the stock must be caused by actual collision, that is, it must be done by the agents, engine, or cars of the company, or the willful misconduct of the trainmen in the course of their employment.

"2. You are further instructed that under the pleadings and evidence in this case the defendant cannot be held liable for any injury to plaintiff's horses, unless you find that said horses were willfully driven or frightened onto said bridge by defendant's employes in starting the train, said horses not having been injured by any actual collision or contact with the engine or cars of the train, and said engine and train of defendant's having come to a stop before said horses, or either of them, went on the bridge where injured."

These instructions were properly refused, as they do not

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conform to the testimony and the law in the case. There is no error in the record, and the judgment is

AFFIRMED.

THE other judges concur.

36 254
640 256

JOHN D. THOMAS V. CHARLES W. EDGERTON, CON-
STABLE, ET AL.

FILED FEBRUARY 15, 1893. No. 4671.

1. **Replevin Bonds: LIABILITY OF OFFICERS FOR SUFFICIENCY OF SURETIES: CONSTABLES.** At common law an officer was liable for the sufficiency of the sureties on a replevin bond; but under section 189 of the Code he is liable after twenty-four hours only where the defendant in replevin has excepted to the sufficiency of the sureties, and they or new sureties have failed to justify.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

Bradley & De Lamatre, for plaintiff in error.

W. S. Felker, G. A. Rutherford, and George H. Hastings, contra:

The officer executing a writ of replevin is not liable for the sufficiency of the sureties on the replevin bond where the defendant fails to except thereto. (*Westervelt v. Bell*, 19 Wend. [N. Y.], 531; *Wilson v. Williams*, 18 Id., 585; *Cobbey, Replevin*, sec. 695.) A constable who approves the sureties on a replevin bond is protected by the provisions of sec. 189 of the Code. (*State v. Wait*, 23 Neb., 166.)

MAXWELL, CH. J.

This is an action brought by the plaintiff against Edgerton, who is a constable in the city of Omaha, and his sureties, for approving an insufficient undertaking given by one Helm in an action of replevin. The facts are substantially as follows: In December, 1886, one Olive Helm began an action in replevin against the plaintiff before a justice of the peace to recover the possession of certain goods, to which she claimed the right of possession. The order of replevin was placed in the hands of Edgerton for service. He thereupon seized the goods and delivered them to Helm upon the making and delivery to him of an undertaking signed by one J. F. Clapp as surety. The judgment in the replevin action was in favor of the plaintiff for a return of the goods or the value thereof assessed at \$90. The goods could not be found, and it is alleged that Clapp is insolvent, and was known to Edgerton to be so when he approved the bond. There is no charge in the petition of willful misconduct on the part of Edgerton. On the trial of the cause judgment was rendered in favor of the defendants.

Section 1037 of the Code provides: "The officer shall not deliver to the plaintiff, his agent or attorney, the property so taken until there has been executed by one or more sufficient sureties of the plaintiff a written undertaking to the defendant in at least double the value of the property taken, but in no case less than \$50, to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages which may be awarded against him."

Section 1040 provides: "If the undertaking required by section 1037 be not given within twenty-four hours from the taking of the property under said order, the officer shall return the property to the defendant. And if the officer deliver any property so taken to the plaintiff, his agent or attorney, or keep the same from the defend-

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ant without taking such security within the time aforesaid, or if he take insufficient security, he shall be liable to the defendant in damages."

Section 189 also provides: "The defendant may, within twenty-four hours from the time the undertaking referred to in the preceding section is given by the plaintiff, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he must be deemed to have waived all objections to them. When the defendant excepts, the sureties must justify upon notice as bail on arrest. The sheriff or other officer shall be responsible for the sufficiency of the sureties until the objection to them is waived as above provided or until they justify. The property shall be delivered to the plaintiff, when the undertaking required by section 186 has been given." This is substantially section 210 of the Code of New York although in that state the exceptions may be filed "within three days." (Voorheis, Code [9th ed.], 394.)

The section above referred to seems to have been copied into the Code from the Revised Statutes of that state (2 Rev. Stat., 527, secs. 28-33).

In *Wilson v. Williams*, 18 Wend. [N. Y.], 585, the statute was construed, and it was held that the officer was not liable. The same ruling was made in *Westervelt v. Bell*, 19 Wend. [N. Y.], 531-533. In the latter case it is said: "The old precedent of declarations in actions on the case against the sheriff for taking insufficient sureties in replevin will no longer answer without some additional averments. Formerly the sheriff was answerable for the sufficiency of the sureties in all cases; but now he is liable only where the defendant in replevin has excepted to the sufficiency of the sureties, and they, or new sureties to be offered by the plaintiff, have failed to justify within the time prescribed by law. (2 R. S., 527, secs. 28-33.) It must now be averred in declaring against the sheriff that an exception was taken that the sureties or others in their

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place did not justify, and that judgment of discontinuance has for that cause been rendered against the plaintiff in replevin." (See also Cobbey, Replevin, sec. 695.) No exceptions were filed to the sufficiency of the sureties and this fact is undisputed. The defendant, therefore, after twenty-four hours would not be liable. It is very clear that both the pleadings and proof fail to show a liability of the defendants, or either of them, to the plaintiff. The judgment is right and is

AFFIRMED.

THE other judges concur.

**HENRY W. HAYNES V. AULTMAN, MILLER & COMPANY
ET AL.**

FILED FEBRUARY 15, 1893. No. 5066.

1. **Revivor of Judgment by Default: DEFENSE: DEFECTIVE SERVICE OF SUMMONS.** Where service upon a defendant is made by leaving a copy of the summons at his residence and judgment is taken against him thereon by default, he may, in an action to revive the judgment, show that the place of service was not his place of residence; that he nor any member of his family had notice of the action until after judgment had been rendered against him, together with any other defense to the judgment.
2. ———: ———: **REVIEW: INJUNCTION.** In an action to revive a dormant judgment certain defenses were set up which tended to show that the court when it rendered the judgment had no jurisdiction of the defendant and that he had a defense to the action. A demurrer to the answer was sustained. *Held*, That the defendant should have prosecuted error from the ruling on the answer and that he could not bring an action by injunction to enjoin the judgment and set up substantially the same facts as were set forth in his answer.

**ERROR from the district court of Antelope county.
Tried below before POWERS, J.**

36	257
45	316
36	257
58	19

G. M. Cleveland and E. W. Adams, for plaintiff in error.

H. M. Utley, contra.

MAXWELL, CH. J.

This is an action to enjoin a judgment. A demurrer was sustained to the amended petition, and the plaintiff not desiring to amend his petition the action was dismissed. The petition is as follows:

"The plaintiff complains of the defendants for that on the 8th day of July, 1880, the defendant Aultman, Miller & Co. obtained three several judgments against the plaintiff in his absence, before Michael Costello, a justice of the peace in and for Holt county, Nebraska, copies of the record of which judgment are hereto attached, marked respectively Exhibits A, B, and C, and made a part hereof.

"2. On the 6th day of April, 1881, said defendant Aultman, Miller & Co. caused a transcript of said judgments to be filed in the office of the clerk of the district court of Holt county, Nebraska.

"3. No execution was ever issued upon said judgments, or either of them, until the 12th day of December, 1889, as hereinafter stated, and prior to said last mentioned date no attempt was, by said Aultman, Miller & Co., ever made or threatened to be made to enforce said judgments, or either of them, or any part thereof, and this plaintiff believed from the facts hereinafter set out that no attempt ever would be made to collect said judgments or any part thereof, and the said judgments became dormant by a lapse of time and the operations of the law on the 8th day of July, 1885.

"4. That on the 27th day of August, 1888, the defendant Aultman, Miller & Co. filed in the office of the clerk of the district court of Holt county, Nebraska, three separate motions to revive said judgments, copies of which

motions are hereto attached, marked Exhibits 1, 2, and 3, and made a part hereof.

"5. That on the 30th day of August, 1888, the Hon. M. P. Kinkaid, judge of the district court of Holt county, Nebraska, made three separate orders commanding the plaintiff herein to show cause why said judgments should not be revived, which orders were, on the 10th day September, 1888, served on the plaintiff herein, copies of which orders are hereto attached, marked respectively Exhibits 4, 5, and 6, and made a part hereof.

"6. That on the 19th day of September, 1888, the plaintiff herein filed in the office of the clerk of the district court of Holt county, Nebraska, three separate answers, copies of which are hereto attached marked respectively Exhibits 7, 8, and 9, and made a part hereof.

"7. That on the 23d day of October, 1889, defendant Aultman, Miller & Co. filed in the office of the clerk of the district court of Holt county, Nebraska, a demurrer to said answers of the plaintiff, a copy of which demurrer is hereto attached, marked Exhibit 10, and made a part hereof.

"8. That on the 9th day of November, 1889, the district court of Holt county, being in session, sustained said demurrer and entered an order and judgment in said court intending to revive said judgment, a copy of which order and judgment is hereto attached, marked Exhibit 11, and made a part hereof.

"9. That on the 12th day of December, 1889, defendant Aultman, Miller & Co. caused an execution to issue out of said district court upon said order and judgment, and caused said execution to be placed in the hands of defendant H. C. McEvony, as sheriff of said county, and said defendant McEvony, as such sheriff, threatens to and is about to levy said execution upon the property, and unless restrained by the order of this court the defendant will cause the property of this plaintiff to be taken, levied

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upon, and sold to satisfy said execution and said order and judgment.

"10. That the said judgments were rendered by said justice of the peace in plaintiff's absence and without his knowledge, and no summons or notice of any kind was ever served upon plaintiff in either of the actions in which said judgments were obtained, nor was a copy of any summons or notice of any kind ever left at the usual place of residence of the plaintiff in Holt county, nor with any members of his family in either of said actions, and plaintiff had no residence in Holt county at the time that the said judgments were rendered, and had no residence in Holt county at the time that the writs of summons in said action purport to have been served as set forth in the transcript of said judgments attached hereto, and no member of plaintiff's family resided in said county of Holt at said times, and plaintiff did not know that any of said actions had been begun or were pending against him until four or five weeks after the rendition of said judgments; that copies of said writs of summons were left at a house in Holt county about seven miles southeast of O'Neill, at which house plaintiff had at one time resided, but from which plaintiff and all his family had removed out of Holt county long before the date of the pretended service of said writs, and no copies of either of said writs was ever delivered to plaintiff or left at any other place as above set forth.

"11. That he had a good defense to each of said actions before said justice of the peace in this, that said pretended judgments were founded upon, and said actions brought upon, three promissory notes given by this plaintiff to defendant Aultman, Miller & Co. in payment for a combined reaper and mower which this plaintiff had purchased from defendant Aultman, Miller & Co. under a warranty that said machine was fit for use in cutting hay and grain, on which warranty defendant relied, and without which

said warranty he would not have purchased the same. Said machine was not fit to cut hay and grain as represented by the plaintiff, but was wholly worthless as a mowing machine, and wholly worthless as a reaping machine, and was of no value whatever for any purpose, wherefore there was an entire failure of the consideration for said notes, and the said defendant in said actions, plaintiff herein, would have appeared and made his defense to said action upon said notes if he had had any knowledge whatever that suit had been brought upon said notes, or either of them.

"12. At the time of the rendition of the judgments aforesaid, said justice of the peace, Michael Costello, had no jurisdiction of the person of the defendant therein, Henry W. Haynes, plaintiff herein, and said H. W. Haynes has never had any opportunity to present his defense to the notes sued upon in said actions, and upon which said judgments were rendered, and that, too, without fault or negligence upon his part; and the plaintiff has no remedy at law.

"Plaintiff therefore prays that the defendants may be enjoined from collecting said judgment and enforcing said execution, and from levying upon the property of this plaintiff to satisfy said execution, perpetually, or until such time as defendant Aultman, Miller & Co. will submit to a trial of said causes of action upon which said judgments were founded upon the merits thereof, and for such other relief as may be just and equitable."

It appears from the exhibits attached to the petition, and made a part of it, that in the action to revive the judgments the plaintiff herein filed an answer in which he alleged, in substance, that the judgments were void for want of a finding that Haynes had removed from Holt county when the summons was left at his late residence therein, and that he had no notice of said summons or action until it was too late to appear in the action either by appeal or to open the judgment; that the notes in ques-

Haynes v. Aultman.

tion were given for a combined reaping and mowing machine, which was of no account or value, and the consideration therefor failed. It also appears that a demurrer was filed by Aultman, Miller & Co. to said answer, which demurrer was sustained, and the actions revived for the amounts of the original judgments, interest, and costs. It is probable that the court erred in sustaining the demurrer in those cases, and if the ruling upon the demurrer was before us for review that it would be reversed.

Section 471 of the Code provides "that when a judgment is recovered against one or more persons jointly indebted upon contract, those who were not originally summoned may be made parties to the judgment by action." Where the return of an officer shows service by leaving the summons at the residence of the debtor, the debtor may show as a defense to the judgment that the place of service was not his place of residence. This principle is recognized in *Blodgett v. Ulley*, 4 Neb.; 25, *Lane v. First Nat. Bank*, 6 Kan., 75, and *Sage v. Hawley*, 16 Conn., 106. If the debtor and all the members of his family are absent from the county, and the time of their return is uncertain, or their absence will be protracted beyond the time of trial, it is evident that a summons left at the former residence would not be sufficient to apprise the debtor of the action. For the purposes of that trial the summons would not be served at the residence of the debtor. The theory of our law is that the debtor shall have personal service, or its equivalent—notice left at his actual residence, otherwise it would be possible to perpetrate gross frauds upon the party sued. None of these matters can be considered in this case. This is an attack upon the judgment as revived, and if the court had jurisdiction which rendered the same, and there was an opportunity to defend, this action cannot be sustained. Upon both of these points we must hold with the defendants. The judgment is therefore

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT OF
SOUTH OMAHA, V. J. W. PADDOCK ET AL.

36	263
38	751
36	263
49	678

FILED FEBRUARY 15, 1893. No. 5881.

1. **Cities of the Second Class.** South Omaha, as shown by the census of 1890, is a city of the second class, having more than 8,000, and less than 25,000 inhabitants, and not a city of the first class.
2. **School Taxes: ESTIMATES: LEVY: MANDAMUS.** The school board of South Omaha, on the 6th day of June, 1892, made an estimate of the amount of school tax to be levied in said city for that year. This estimate was imperfect in its statements and details. The defendants held the same until July 14, 1892, when they refused to levy the tax. Afterwards proceedings in *mandamus* were instituted and the court rendered judgment for the defendants. Corrected estimates were then filed. *Held*, That such estimates related back to June 6 of that year, and that it was the duty of the defendants to levy the tax.

ERROR from the district court of Douglas county. Tried below before IRVINE, J.

E. T. Farnsworth, for plaintiff in error.

T. J. Mahoney, *contra*.

MAXWELL, CH. J.

The relator made an application to the defendants to levy a school tax in the school district of South Omaha, and as the defendants refused, the relator applied for a writ of *mandamus*. On the hearing the court rendered a judgment denying the writ because South Omaha was a city of the first class. In 1891 the legislature passed an act in relation to cities of the first class, the first section of which declares that all cities which, according to the census of 1890, contained more than 10,000 and less than 25,000 inhabitants should be cities of the first class. The census

returns show that South Omaha at the time the census was taken in 1890 contained 8,062 inhabitants, and therefore was not a city of the first class. No doubt it contains many more than 10,000 inhabitants at the present time, but that increase does not affect this case. South Omaha, however, is a city of the second class, having more than 8,000 and less than 25,000 inhabitants, and is governed by the provisions of the act in relation to such cities. I South Omaha is a city of the second class it is conceded that the defendants are the proper parties to levy the school taxes, unless there are objections, first, to the estimate and, second, to the time it was received. It will be admitted that the estimate is not as definite as is desirable. The whole amount required is stated, but the amount derived from licenses and other sources is stated at about \$20,000, leaving it to be inferred that \$15,000 should be levied upon the taxable property in the city for the support of schools. The second question is as to the time this tax should be levied. The first estimates were made by the school board on the 6th of June, 1892, and on the 18th of that month they were sent to the defendants. It appears that the resolution of the school board adopting the estimates contained a provision that the tax so levied was to be used for the support of schools, but in their report to the defendants these words were omitted, hence the defendants failed to levy the tax, and continued the cause until the 14th day of July, 1892, when they refused to levy the tax; thereupon an action was brought to compel such levy, and the court held "that the report of the board of education to the defendants was not made according to law." The school board thereupon held a meeting, at which the following proceedings were had:

"SOUTH OMAHA, August 12, 1892.

"To the Honorable the Board of County Commissioners of Douglas County, Nebraska—GENTLEMEN: At a meeting of the board of education of school district of South

State, ex rel. School District, v. Paddock.

Omaha, held on the 11th day of August, 1892, a corrected estimate of the funds required for all purposes was made, and the following resolution was adopted:

"Resolved, by this board, That the following is an estimate of the different funds required by school district of South Omaha for the fiscal year next ensuing: For the support of schools during the fiscal year next ensuing, the total sum of \$30,000; for the purchase of a school site, the total sum of \$2,500; for the erection of a school house, the total sum of \$2,500; making a total amount of funds required for all purposes of \$35,000. You will, therefore, please levy a tax on the taxable property of South Omaha, sufficient to raise the above mentioned funds, less the amount to be derived from other sources. The amount of funds in the hands of the treasurer of said district, and available for the support of school during the fiscal year next ensuing, is about \$16,000; the amount expected to be raised from fines is about \$100; the amount expected to be raised from licenses will be nothing above that already paid into the treasury, which is included in the \$16,000 above mentioned; the amount expected to be raised from the state school money, apportioned to the district, will be about \$4,000. That a duplicate of said estimate was duly sent to the city council of South Omaha.

"SCHOOL DISTRICT OF SOUTH OMAHA,

By W. B. CHEEK, President.

"J. H. BULLA, Acting Secretary."

A copy of this estimate was on the same day served on the defendants, but they refused to levy the tax, whereupon this action was brought to compel such levy. The court below refused to grant the writ because South Omaha was a city of the first class, and, therefore, its city council could levy the necessary taxes. In this the court was mistaken. The amended estimates, as filed in August, were but a continuation of those filed on June 6. The defendants should have notified the relator of the defects complained of and

Hale v. M. P. R. Co.

given an opportunity to correct the same. The cause is very different from one where the first estimate was filed with the board after the levy was made. In such case the right to levy the tax would be very doubtful, but in the case at bar the defendants had the estimates before them—defective, it is true—showing that a tax should be levied. The judgment of the district court is reversed and a peremptory writ is awarded against the defendants as prayed.

REVERSED AND WRIT ALLOWED.

THE other judges concur.

J. T. HALE V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED FEBRUARY 15, 1893. No. 4221.

1. **CARRIERS: SHIPMENT OF LIVE STOCK: FAILURE TO FEED AND WATER: LIABILITY FOR DAMAGES: PLEADING.** Section 4386, Rev. Stat. U. S., imposes a penalty upon a railway company which transports live stock, if the animals are kept in the cars more than twenty-eight consecutive hours, "unless prevented from so unloading by storm or other accidental causes." There is further exception where animals "have proper food, water, space, and opportunity to rest" on the cars. *Held*, That in addition to the penalty imposed by statute, a railway company which failed to comply with the above requirement would be liable in damages to the owner of the stock, but to state a cause of action the petition must show that the case is not within the exceptions named.
2. ———: ———: **NEGLIGENCE: DAMAGES.** In an action for the loss of three horses lost by negligence, and three which died from the same cause, the value of all being placed at \$355, and for damages to two car loads, the jury returned a verdict for \$335.84. *Held*, That it was apparent that the damages were awarded upon both causes of action set forth in the petition, and neither the pleadings, nor proof justifies a verdict for general damages.

ERROR from the district court of Cass county. Tried below before FIELD, J.

Brome, Andrews, & Sheean, and Byron Clark, for plaintiff in error.

J. W. Orr and A. N. Sullivan, contra.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendant in the district court of Cass county to recover for the loss of six horses and damages for injuries to two car loads shipped from San Antonio, Texas, to Norfolk, Nebraska. On the trial of the cause the jury returned a verdict in favor of the plaintiff for the sum of \$335.84, upon which judgment was rendered. A large number of questions are discussed in the brief of the plaintiff, which do not seem to arise in the case and need not be noticed.

There are two counts in the petition. In the first it is alleged "that in May, 1886, the plaintiff shipped 181 horses from San Antonio, Texas, to Omaha, and that three of the said horses, of the value of \$175, escaped through the defendant's negligence and were lost."

The second cause of action is as follows.

"1. The plaintiff complains of the defendant for that the defendant now is, and at all times hereinafter mentioned has been, a corporation, organized and existing under and by virtue of the laws of the state of Missouri, and operating lines of railway into and through the states of Missouri, Texas, and Nebraska, and into and through the county of Cass in the said state of Nebraska.

"2. At all the times and dates hereinafter mentioned defendant was a common carrier engaged in the business of transporting goods, wares, merchandise, and live stock for hire, for the public generally, to and from points on the line of its said railway, and on lines connected there-

Hale v. M. P. R. Co.

with, with an office at San Antonio, Texas, and was operating its lines of railway between said town of San Antonio, Texas, and various points in said state of Nebraska.

"3. On the 19th day of December, 1886, plaintiff was engaged in buying horses in the state of Texas, with headquarters at San Antonio in said state, for shipment to and sale at points in said state of Nebraska.

"4. On the date aforesaid the defendant, for a good and valuable consideration, did undertake to and contract with the plaintiff for the transportation by said defendant for plaintiff of two car loads of mares belonging to said plaintiff from said San Antonio, Texas, to Norfolk, Nebraska, and in that behalf to protect and care for said mares and deliver them in good and safe condition within a reasonable and proper time at the point last above named.

"5. Under and in pursuance of said contract, which was in writing, on the date aforesaid plaintiff delivered to said defendant at said San Antonio, Texas, for shipment to Norfolk, Nebraska, fifty-four head of mares, which were received by defendant and placed in two stock cars used for the shipment of stock.

"6. Said defendant did not transport said mares to Norfolk, Nebraska, in a good and sound condition, and did not protect and care for said mares while in defendant's custody, but to the contrary said defendant, by its agents and servants, carelessly and negligently failed and refused to furnish and provide cars properly furnished and bedded for the shipment of said mares, and negligently refused to enable or permit plaintiff to procure proper bedding for the cars in which said mares were shipped, and said defendant, by its servants and agents, carelessly and negligently, and wholly disregarding plaintiff's rights in the premises, kept said mares confined in said cars while transporting them over defendant's line of railway, from Muscogee, Indian Territory, to Kansas City, Missouri, for thirty-six hours without food or water, or care of any kind,

and carelessly and negligently refused to permit said mares to be unloaded and fed and watered and cared for by plaintiff while *en route* between said points.

"7. Said defendant, by its servants and agents, carelessly and negligently, and wholly disregarding plaintiff's rights in the premises, kept said mares confined in said cars while transporting them over defendant's line of railway from Kansas City, Missouri, to Norfolk, Nebraska, for forty hours without food, water, or care of any kind, and carelessly and negligently refused to permit said mares to be unloaded and fed and watered and cared for by plaintiff while *en route* between said points, although plaintiff offered and requested that he be allowed so to do.

"8. Defendant, by its servants and agents, negligently and without cause delayed the transportation of said mares between the points hereinafter referred to and kept said mares confined in said cars, while *en route* from San Antonio to Norfolk, five days longer than was necessary and required for the transportation of said mares between said points in a proper and careful manner.

"9. That by reason of said carelessness and negligent acts of the servants and agents of defendant hereinbefore mentioned, three of said mares became sick and died, and were wholly lost to plaintiff, to plaintiff's damages in the sum of \$180. The mares so lost were of the value of \$180, and the balance of said mares became sick and diseased and had their manes and tails eaten off, thirty-four of said number being with foal lost their colts, and all much depreciated in value, to plaintiff's damage in the sum of \$1,850. Wherefore plaintiff prays judgment against said defendant for the sum of \$1,900, with interest thereon from the 1st day of May, 1887, besides costs of suit."

It will be observed that the second shipment was made December, 1886; that the cars were eleven days on the way; that in two instances it is charged the animals were kept on the cars more than twenty-eight hours, contrary

to the act of congress of March 3, 1873 (sec. 4386, Rev. Stat. U. S.), "unless prevented from so unloading by storm or other accidental causes." There is also a further exception in section 4388, viz., that when animals "do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply." The proof as to delay in feeding and watering the animals before reaching Kansas City shows that the train was somewhat delayed, so far as we can see without the fault of the employes, and there was a delay of two hours at Kansas City, by reason of an engine being off the track. The proof also shows that the delay at Kansas City was caused by reaching that place on Christmas eve, and no freight train left for Omaha until Sunday evening; that there were no facilities at Papillion for feeding stock but it was proposed to stop at Fremont where there were facilities, but the plaintiff went to sleep and the stock was carried by. It is true the plaintiff testifies that the conductor promised to wake him up at Fremont, but failed to do so. But it will not be seriously contended that the company would be liable because the conductor failed to awaken the plaintiff. It was no part of his duties, and while an act of courtesy which should have been performed, yet if the conductor, from forgetfulness or other cause, failed in that regard, the company is not liable. The petition should show that this case is not within either of these exceptions in order to state a liability of the defendant for loss or damage.

2. The statement of injury to the animals is too general to admit proof of special damages. Thus, it is charged that more than thirty of the mares lost their colts, but there is nothing to show that the defendant is at fault in the matter. It is not contended that the injury was caused by the slow rate of travel, or by the failure to feed, water, and rest regularly, nor by other neglect of the defendant than to the jolts and tremor of the cars. So in regard to the depreciation in value of the mares, the charge is gen-

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eral, and the proof in regard to all of these matters is but little better than the petition. An important fact seems to have been given but little weight, that these animals were transported in the month of December about 1,100 miles north, from a comparatively mild climate to a much colder one, and the colder weather no doubt had much to do with the pinched appearance of the animals when they reached Norfolk. No loss seems to have occurred on the U. P. railway from Omaha to Norfolk, and it seems to be unnecessary to discuss that question. So in regard to liability of the defendant under its contract. As the plaintiff evidently recovered on both his causes of action in the court below, there is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

SAMUEL S. PORTER V. SHERMAN COUNTY BANKING
COMPANY ET AL.

FILED FEBRUARY 15, 1893. No. 4612.

1. **Evidence: VERDICT: REVIEW.** The evidence being in writing and practically undisputed as to the amount due the plaintiff, a verdict for a sum greatly less cannot be sustained.
2. **Private Banks: CORPORATIONS: LIABILITY OF STOCKHOLDERS: UNPAID STOCK.** W. and T. were conducting a private bank at L., and on November 1, 1887, organized a corporation with an alleged capital of \$50,000, of which they retained a controlling interest. They turned over the deposits and assets of the private bank to the new corporation, and notes were taken from a number of the stockholders for the amount of their stock. *Held*, That the stockholders were liable for the unpaid stock held by each, and for a sum equal to the shares so held by each for all liabilities of the bank accruing while he was a stockholder.

36 271
240 275

- 3 **De Facto Corporations.** The proof tends to show a *de facto* corporation and not a partnership.
4. **Banks: FAILURE TO PUBLISH NOTICE OF CONDITION: LIABILITY OF STOCKHOLDERS.** The debts having been contracted by the bank before it was in default, the provisions of sections 136 and 139 of the corporation law do not apply.
5. **Misjoinder of Causes of Action: WAIVER OF DEFECT.** Where there is a misjoinder of causes of action which plainly appears on the face of the petition, the adverse party should demur for that cause. If he fails to do so he will waive the defect.

ERROR from the district court of Sherman county. Tried below before HAMER, J.

Nightingale Bros., for plaintiff in error.

G. M. Lambertson and *J. R. Scott*, *contra*.

J. H. Broady, *amicus curiae*.

MAXWELL, CH. J.

This is an action against the banking company and the several stockholders thereof to recover the sum of \$3,817.85, with interest. The cause of action is set forth in the petition as follows:

"The said Sherman County Banking Company, defendant, is indebted to plaintiff in the sum of \$3,768.88, with interest from July 1, 1888, at nine per cent per annum, as per agreement on an account stated between said parties, for moneys deposited with and loaned to said banking company, said account being so stated on July 1, 1888, upon which statement a balance of \$3,768.88 was found due plaintiff from said defendant, the Sherman County Banking Company; no part thereof has been paid, though often demanded.

"3. There is due plaintiff from said defendant, the Sherman County Banking Company, on an account cur-

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rent the sum of \$48.97. The following is a copy of said account with all credits, to-wit:

“DR.

To rent of room occupied by said Sherman County Banking Company from May 1, 1888, to January 1, 1889, at \$20 per month.....	\$160 00
To rent collected of I. J. Hughes, as agent of plaintiff, from July 22, 1888, to December 22, 1888, at \$7 per month.....	85 00

“CR.

By taxes paid for plaintiff.....	\$146 03
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\$195 00

To balance due.....	\$48 97
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“No part thereof has been paid, though often demanded.

“4. The defendants Ezra S. Hayhurst, Lyman J. Tracy, John Hogue, Milton A. Theis, Edward E. Whaley, H. J. Shupp, Charles A. Wheeler, William H. Morris, James K. Pearson, Joel R. Scott, Charles W. Gibson, and William R. Mellor were, at the time of contracting said debt by the Sherman County Banking Company, defendant, stockholders of said corporation, and still are, and at all times since November 1, 1887, have been, stockholders of said corporation. ‘The said corporation made an assignment for the benefit of creditors on December 26, 1888, and is wholly insolvent.’ (The last sentence is an amendment inserted by leave of court June 20, 1889.)

“The said Sherman County Banking Company, defendant, is not a duly organized and duly incorporated company under the laws of the state of Nebraska, but has wholly failed to comply with the provisions of chapter 16, Compiled Statutes of Nebraska, in relation to giving notice, and other requisitions of organization, and has failed to comply with general provisions of law governing cor-

porations. Such failure to comply with the law is specifically set forth as follows, to-wit:

“(a.) The articles of incorporation of said Sherman County Banking Company, as filed and recorded in the county clerk’s office, of said county of Sherman, and state of Nebraska, do not set forth the time and conditions on which the capital stock of said corporation is to be paid in.

“(b.) No notice of the incorporation or organization of said Sherman County Banking Company was ever published by said corporation in any newspaper near the principal place of business of said corporation.

“(c.) No copy of the by-laws of said corporation, with the names of the officers appended thereto, was ever posted in a conspicuous place at the place of doing business of said corporation, in Loup City, Nebraska, subject to public inspection.

“(d.) No notice of the amount of all the existing debts of said corporation was ever printed and published in any newspaper, signed by the president and a majority of the directors of said corporation, since the time of commencing business of said corporation, on November 1, 1887, until the present time.

“(e.) The capital stock of said corporation was not fully subscribed at the date of filing the articles of incorporation of said Sherman County Banking Company, in the county clerk’s office of said county, nor at any time thereafter.

“(f.) The capital stock of said corporation was not paid for in cash, but about 400 shares of said capital stock, representing a nominal value of \$40,000, was paid for with the notes of said stockholders, payable to the order of said corporation, and part of the remaining \$10,000 worth of said capital stock was paid for with real estate, which said corporation had no power to take and hold, and with worthless notes and securities belonging to Edward E. Whaley and Milton A. Theis, formerly partners, doing business as bankers under the firm name of the Sherman

County Banking Company, and only a very small portion of said capital stock was paid for with cash, to-wit, about \$3,000.

"(g.) No quarterly statement under oath of the assets and liabilities of said corporation was ever made and published by said corporation as required by section 7, article XI, of the constitution of the state of Nebraska, entitled 'Corporations,' subdivision 'Miscellaneous Corporations.'

"6. By reason of the failure of said corporation, defendant, to comply with the provisions of the law as set forth in paragraph 8, the defendants Ezra S. Hayhurst, Lyman J. Tracy, John Hogue, Milton A. Theis, Edward E. Whaley, H. J. Shupp, Charles A. Wheeler, William H. Morris, James K. Pearson, Joel R. Scott, Charles W. Gibson, and William R. Mellor became and are jointly and severally liable to the plaintiff for the amount of the debt of said Sherman County Banking Company, defendant, as set forth in this petition, as stockholders of said corporation."

There is a joint answer of the defendants, in which they set up various defenses.

On the trial of the cause the jury returned a verdict for the plaintiff for the sum of \$1,741.02, upon which judgment was rendered. It will be observed that one of the principal grounds upon which a recovery is sought against the stockholders is, that no articles of incorporation were entered into and filed before the bank commenced business. This, however, is a mistake, as articles were both filed and published, setting forth the essential facts required by statute, and the banking company, when doing business, was a *de facto* corporation. Where there is a substantial compliance with the law, mere defects, even if they exist, will not render the articles void, therefore the stockholders are not liable for the failure to incorporate.

2. The testimony tends to show that prior to November 1, 1887, Edward E. Whaley and Milton A. Theis were

conducting a bank at Loup City; that prior to that time the plaintiff had transacted business with said firm as bankers and had on deposit with them at the time of the transfer the sum of \$2,711.35. This amount the new corporation assumed. It also collected rent and other moneys for the plaintiff to make up the amount claimed.

The Sherman County Banking Company filed its articles of incorporation in the county clerk's office on the 31st day of October, 1887. These articles authorized it to transact a general banking, exchange, and collecting business at Loup City. The capital stock is fixed at \$50,000, with leave to increase the same from time to time to \$300,000. It occupied the banking house formerly occupied by Whaley and Theis, who were the promoters and principal stockholders of the new bank. They turned over to the new bank the furniture, safe, and fixtures of the old one, which were valued at the sum of \$1,489.37; also all real estate possessed by said parties, at the value of \$10,506.79; all bills receivable or bills discounted of its predecessor, at the value of \$67,635.74. In consideration of these alleged assets, the new banking company assumed the liabilities of the banking firm of Whaley & Theis, being ordinary deposits, \$21,668.74, and time deposits, \$10,236.95. The alleged assets were thus \$47,726.21 in excess of the deposits. The bank failed December 26, 1888. The plaintiff, to establish his own claim, identified a pass book furnished him by the bank, from which it appears in the handwriting of the cashier of the bank that the balance due the plaintiff on deposit on July 1, 1888, was the sum of \$3,768.88. The plaintiff, it appears, was at Loup City at the time named, and he examined the books of the bank and the sum stated seems to have been agreed upon as his due. The whole account, however, shows an error of \$361.61, to be deducted, which leaves a balance due the plaintiff on the first day of July, 1888 of \$3,407.27 upon the deposits, and a further sum of \$47.42 to \$207.40 upon

an account for rent, etc. As to the amount of deposits there is practically no dispute, so that in no event can the verdict be sustained. The testimony tends to show that in organizing the bank as a corporation but little of the capital stock was paid up. There were 500 shares in all. Of these Whaley & Theis had 134 each, thus having a controlling interest. The remainder of the shares were held by various persons, who, so far as we can see, acted in good faith. It is true they gave their notes to the bank in payment for their stock, but it seems to have been done in ignorance and without any actual intent to defraud. The two principal stockholders seem to have put in nothing except the comparatively worthless assets of their private bank, which as heretofore stated were valued at a great sum but were worth but little. Whaley & Theis no doubt knew when the new bank was organized that the assets turned over by them were comparatively worthless; but they seem to have stood well in the community, and no doubt were supposed to be doing a successful business, and after the new bank was organized the stock seems to have been of full par value. Thus we find an attempt to charge Morris twenty-five per cent premium on forty shares purchased by him. He refused to take the stock at the price charged, not because it was not worth that sum, but because he had not agreed to pay that amount. The purpose of the reorganization no doubt was to strengthen the bank by giving it greater credit, and as the stock could not be sold for ready cash, notes of the persons induced to become stockholders were taken. This is a mode of doing banking business that this court cannot commend, and where it is done for the purpose of defrauding, the court must denounce; but as to all the stockholders except Whaley and Theis, it is evident that there was no attempt to defraud, and that they are not personally liable.

Section 136, chap. 11, Gen. Stat., p. 200, is as follows:
"Every corporation hereafter created shall give notice

annually, in some newspaper printed in the county, or counties, in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest paper in the state, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and majority of the directors; and if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all debts of the corporation then existing, and for all that shall be contracted before such notice is given."

Section 139 provides, "If any corporation fail to comply substantially with the provisions of this subdivision, in relation to giving notice and other requisitions of organization, the property of all the stockholders shall be liable for the corporate debts."

It will be seen that section 139 applies only where there has been a failure to comply substantially with the law in regard to organization and giving notice, as in *Abbott v. O. S. Co.*, 4 Neb., 416. In the case at bar, however, there was a substantial compliance with the law. A forfeiture is not favored in law because it tends to rob a party of his just rights; and the same rule applies where it is sought to charge a party personally with a debt which he did not assume, but is imposed because of some alleged wrong doing on his part. In such case the acts of omission or commission must clearly bring the case within the penal provisions of the statute. Otherwise there can be no recovery beyond the limit fixed in the constitution. This principle is recognized in *Smith v. Steele*, 8 Neb., 115, where the stockholders were held liable only for debts contracted while the corporation was in default in publishing the annual notice. The question then arises as to the right to proceed against the stockholders of the bank. We do not think this case comes within either section 136 or 139 of the chapter on corporations in the General Statutes, although this case was tried before the modification

of those sections in 1891, for the reason that the debt was not incurred while the officers of the bank were in default in publishing notice of the condition of the bank; so that those sections may be left out of the case. The stockholders are each liable for the amount of his unpaid stock, "and to its creditors over and above the amount of stock held by him to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remain such stockholder." (Constitution, art. XIII, sec. 7.) The cause of action accrued before our present banking law took effect, and is not governed by its provisions. The question of usury does not arise in the case and need not be considered. Where the officers of an insolvent bank, by willful, false representations as to the amount of paid-up stock of the bank, induce persons to deposit money therein, they are guilty of a wrong—in effect, of obtaining money under false pretenses, and they will be personally liable therefor. Some objection is made to a misjoinder of causes of action, but such misjoinder appeared on the face of the petition, and was cause of demurrer on that ground. As the objection was not raised it is waived. Upon the whole case, it is one proper for a court of equity to adjust, and it is evident that amended pleadings should be filed and further testimony taken. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

36	230
43	237

CHARLES GARTNER V. STATE OF NEBRASKA.

FILED FEBRUARY 15, 1893. No. 5319.

1. **Criminal Law: FINAL JUDGMENT: REVIEW ON ERROR.** The rulings of the district court in a criminal case cannot be reviewed by this court prior to the rendition of a final judgment in the prosecution.
2. ———: **INTERLOCUTORY ORDER: ERROR PROCEEDINGS.** An order of the district court overruling a plea in abatement to an indictment, is not a final order within the meaning of the statute, and a petition in error cannot be prosecuted therefrom previous to the prisoner's conviction.

ERROR to the district court for Pawnee county. Tried below before APPELGET, J.

The plaintiff in error was indicted for fraudulently disposing of mortgaged property. From an order overruling his plea in abatement he commenced a proceeding in error. *Dismissed.*

G. M. Humphrey, for plaintiff in error.

George H. Hastings, Attorney General, for the state:

The writ of error is available to any person convicted of a crime, but can issue only in those cases where the judgment of the lower court is final. In this case the plaintiff in error has been convicted of no crime, nor has final judgment been entered. The action is prematurely brought to this court. An order made by the trial court upon a motion to quash an indictment or information, or upon a challenge to the array or any other interlocutory order cannot be reviewed until final judgment has been entered. (*Grimes v. Chamberlain*, 27 Neb., 605; *Soofield v. State National Bank*, 8 Id., 16; *Cooke Mfg. Co. v. Clark*, 23 Id., 702; *Daniels v. Tibbets*, 16 Id., 666; *Aspinwall v. Aspinwall*, 18 Id., 463; *Green v. State*, 10 Id., 103; *Mc-*

oalf's Case, 11 Coke [Eng.], 38; *Rex v. Kenworthy*, 3 Dowling & Rylands [Eng.], 173; *People v. Merrill*, 14 N. Y., 74; *Loftin v. State*, 11 Sm. & M. [Miss.], 358; *Bogert v. People*, 6 Hun [N. Y.], 262; *Cochrane v. State*, 30 O. St., 61; *Kinsley v. State*, Id., 508; *Willingham v. State*, 14 Ala., 539; *Patten v. People*, 18 Mich., 314; *Hedges v. Madison Co.*, 1 Gilman [Ill.], 306; *Peet v. McGraw*, 21 Wend. [N. Y.], 667; *People v. Stearns*, 23 Id., 634; *State v. Dillon*, 3 Haywood [Tenn.], 174; Bishop, Criminal Procedure, sec. 1366; Wharton, Criminal Pleading and Practice, sec. 775; *Inskeep v. State*, 35 O. St., 482.)

NORVAL, J.

On the 21st day of April, 1891, an indictment was returned in the district court of Pawnee county against plaintiff in error, Charles Gartner, charging him with having fraudulently disposed of certain personal property, covered by a chattel mortgage, during the existence of the lien thereon. To this indictment plaintiff in error, at the October, 1891, term of said district court, filed a plea in abatement, alleging as grounds for quashing the indictment:

"1. That one Evan Davis, a member of the grand jury that found the indictment, was not, at the time of finding the same, a qualified elector in the state of Nebraska.

"2. The indictment was not found by a full and legal grand jury."

To this plea the county attorney answered by a general denial. The issue thus formed was tried to the court, and the plea in abatement was overruled. Whereupon plaintiff in error filed a motion for a new trial on his plea in abatement, which was overruled by the court, and an exception was taken to the ruling. The record shows that the cause was continued until the next succeeding term of the district court, and this appears to have been the last step taken in the case. There has been no trial upon the merits, nor has a final judgment been rendered.

In re Betts.

We agree with the attorney general, that the case has been prematurely brought to this court. It has been held in this state, in an unbroken line of decisions in civil cases, that a writ of error does not lie to review the rulings of the district court in a cause until a final judgment has been rendered therein, disposing of the entire suit. And the rule is the same in criminal cases. (*Green v. State*, 10 Neb., 102.) An order of the district court overruling a plea in abatement to an indictment is interlocutory merely and not a final order, within the meaning of the statute governing proceedings in error. The ruling complained of cannot be reviewed upon error previous to the prisoner's conviction of the crime charged. (*Green v. State, supra*; *Kinsley v. State*, 3 O. St., 508; *Cochrane v. State*, 30 Id., 61; *Inskeep v. State*, 35 Id., 482; *People v. Merrill*, 14 N. Y., 74; *People v. Stearns*, 23 Wend. [N. Y.], 634; *Farrell v. State*, 7 Ind., 345; *Woolley v. State*, 8 Id., 377; *Pigg v. State*, 9 Id., 363; *Reese v. Beck*, Id., 238.) As there has been no final judgment in the court below, the petition in error is dismissed for want of jurisdiction.

DISMISSED.

THE other judges concur.

36	282
145	750
36	282
47	180

36	282
50	484
54	669
55	314
55	705

IN RE GORHAM F. BETTS.

FILED FEBRUARY 15, 1893. No. 5920.

36	282
61	430
61	551

1. **Habeas Corpus: REVIEW.** Mere errors and irregularities in a judgment or proceeding of a court in a criminal case, under and by virtue of which a person is imprisoned, which are not of such a character as render the proceedings void, cannot be reviewed on an application for a writ of *habeas corpus*. That writ cannot operate as a writ of error.

2. ———: ———: GRAND JURY. Defects or irregularities in the calling, drawing, or summoning of grand juries cannot be considered upon *habeas corpus*.

ORIGINAL application for writ of *habeas corpus*.

William B. Price and *Charles O. Whedon*, for petitioner.

George H. Hastings, Attorney General, and *N. Z. Snell*, for the state.

NORVAL, J.

This is an original application to this court by the petitioner, Gorham F. Betts, for a writ of *habeas corpus*. The petitioner is confined in the jail of Lancaster county by the sheriff of said county, by virtue of four warrants, or writs of *capias*, issued by the clerk of the district court of the said county of Lancaster, which said warrants were respectively issued and based upon four indictments found and returned into said court at the September, 1892, term thereof by the grand jury of said county, which said indictments charge the petitioner with the commission of divers felonies.

The petition for the writ of *habeas corpus* shows that the term of court at which said indictments were presented and filed commenced on the 19th day of September, 1892, and that the only order made by the judge of said court directing a grand jury to be drawn or summoned to attend at the said term of court was and is an order made in open court by the judges thereof on the 25th day of October, 1892.

The petition also charges, in substance, that neither the clerk of said district court, nor his deputy, together with either the sheriff, his deputy, or the coroner of said county, ten days, or any time, before the first day of the session of said district court at said term thereof, met and drew the names of sixteen persons to serve as grand jurors;

In re Betts.

that the county board of said county did not twenty days, nor any number of days, before the commencement of the term of court at which said indictments were found and presented, select twenty-three persons, possessing the qualifications as provided in section 2 of chapter 43 of the Session Laws of 1889, to serve as grand jurors; that no order, proceeding, or step was made, had, or taken by either of the judges of said court, nor by the county board, the county clerk, his deputy, the sheriff, his deputy, nor the coroner in the selecting, drawing, or summoning of a grand jury for said September term of said court prior to the commencement of said term, nor for more than a month after such commencement.

The cause is submitted on a general demurrer to the petition. The sole ground upon which the writ is asked is that the grand jury which indicted the petitioner was not a legal body, for the alleged reason that the grand jurors were not ordered, selected, and summoned at the time and in the mode prescribed by section 5227 of Cobbey's Consolidated Statutes.

Whether the said grand jury was or was not a legally constituted tribunal we are not called upon to determine in this case, nor do we now decide. The supposed errors and defects relied upon are not jurisdictional, and hence are not available in a proceeding like this, for it is well established in this state that mere errors and irregularities in a judgment or proceedings of an inferior court in a criminal case, under and by virtue of which a person is imprisoned, or deprived of his liberty, but which are not of such a character as to render the proceedings absolutely void, cannot be reviewed on an application for a writ of *habeas corpus*. The writ cannot perform the office of a writ of error, but only reaches jurisdictional defects in the proceedings. (*Ex parte Fisher*, 6 Neb., 309; *In re Balcom*, 12 Id., 316; *State v. Banks*, 24 Id., 322; *Buchanan v. Mallalieu*, 25 Id., 201.) And the rule just stated has sup-

In re Betts.

port in numerous decisions from other courts. (*State v. Orton*, 67 Ia., 554; *In re Graham*, 74 Wis., 450; *In re Ellis*, 44 N. W. Rep. [Mich.], 616; *In re Pikulik*, 51 Id. [Wis.], 261; *Emanuel v. State*, 36 Miss., 627; *Ex parte Boland*, 11 Tex. Ct. App., 159; *Ex parte Bowen*, 25 Fla., 214; *Com., ex rel. Davis, v. Lecky*, 1 Watts [Pa.], 66; *People v. Ruloff*, 5 Parker Cr. Rep. [N. Y.], 77; *Ex parte McCullough*, 35 Cal., 97; *Ex parte Mirande*, 14 Pac. Rep. [Cal.], 888; *In re Bion*, 59 Conn., 372; *Ex parte Smith*, 26 Pac. Rep. [Cal.], 638; *Ex parte Brandon*, 4 S. W. Rep. [Ark.], 452; *Ex parte McKnight*, 48 O. St., 588; *Ex parte Parks*, 93 U. S., 18; *Ex parte Prince*, 9 So. Rep. [Fla.], 659; *O'Malia v. Wentworth*, 65 Me., 129.)

The Texas court of appeals, in *Ex parte Boland*, *supra*, in speaking of the office of the writ of *habeas corpus*, say that "the writ may be resorted to when the proceedings sought to be inquired into are radical in their character, illegal, and void. (*Ex parte Slaren*, 3 Tex. Ct. App., 662.) It deals with such irregularities as render the proceedings void. (*Perry v. State*, 41 Tex., 488.) It does not reach such irregularities as would render a judgment voidable only, but only such irregularities as render the proceedings void. (*Ex parte McGill*, 6 Tex. Ct. App., 498.) Illegality is properly predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguishable from mere rules of procedure. (*Ex parte Schwartz*, 2 Tex. Ct. App., 75.) An irregularity is defined to be a want of adherence to some prescribed rule or mode of proceeding. It consists in omitting to do something which should have been done, or in doing it in an unreasonable time, or in an improper manner."

The principle deducible from the authorities already cited is that where the party applying for a writ of *habeas corpus* is held in custody under a process, regular on its face, issued by a court having jurisdiction of the offense charged and of the person, if the proceedings are not void, although

In re Betts.

they may be erroneous or voidable, he cannot obtain relief by *habeas corpus*; but where the proceedings are wholly void, because of want of jurisdiction of the court over the subject-matter, or are illegal, as distinguishable from being merely erroneous, the writ of *habeas corpus* is an appropriate remedy.

The statute confers authority upon the judge of a district court to order a grand jury for any term he chooses. The authority thus conferred was exercised by calling the grand jury in question. The district court of Lancaster county had jurisdiction of the subject-matter, and it has the power to pass upon the validity of the organization of such grand jury. Its ruling, in case there should be a conviction, can be reviewed by a writ of error, but its proceedings cannot be assailed collaterally. Objections to the manner of drawing, summoning, and impaneling of a grand jury must be taken advantage of by plea in abatement to the indictment, or motion to quash, or they will be waived. (*McElvoy v. State*, 9 Neb., 157; *Davis v. State*, 31 Id., 247.)

Section 444 of the Criminal Code declares that "the accused shall be taken to have waived all defects which may be excepted to by a motion to quash or a plea in abatement by demurring to an indictment, or pleading in bar, or the general issue." A mere reading of the above statutory provision clearly shows that the supposed errors here relied upon for a discharge of the petitioner are defects not going to the matter of jurisdiction. If they were, they could not be waived. That is plain. Our conclusion is that the legality of the grand jury cannot be inquired into on *habeas corpus*. The authorities so hold. (*Ex parte Warris*, 9 So. Rep. [Fla.], 718; *In re Ellis*, 44 N. W. Rep. [Mich.], 616; *Ex parte McConnell*, 23 Pac. Rep. [Cal.], 1119; *In re Wilson*, 140 U. S., 575; *Ex parte Twohig*, 13 Nev., 302; *Ex parte Springer*, 1 Utah, 214.)

It follows from what we have already said that the de-

State v. Yates.

murrer to the application for the writ must be sustained, and the action

DISMISSED.

THE other judges concur.

STATE OF NEBRASKA V. WILLIAM J. YATES.

FILED FEBRUARY 15, 1893. No. 4982.

Criminal Law: JUSTICE OF THE PEACE: JURISDICTION. A justice of the peace has no jurisdiction to sit as a trial court in a criminal case where the statute creating the offense provides that the punishment may be both a fine and imprisonment. In such case the justice can proceed only as an examining magistrate.

EXCEPTIONS to the decision of the district court for Fillmore county, MORRIS, J., presiding. Filed under the provisions of section 515 of the Criminal Code. *Exceptions overruled.*

Charles H. Sloan, County Attorney, for the state.

F. B. Donisthorpe, contra.

NORVAL, J.

A complaint was filed in a justice court of Fillmore county charging the defendant with willfully resisting the coroner of said county while executing a certain writ of replevin, duly issued out of the district court of said county and placed in his hands for service. Over the objections of the defendant, a jury was impaneled, the defendant was tried, and the jury returned a verdict of guilty. Thereupon the justice sentenced Yates to pay a fine of \$3. The defendant prosecuted a petition in error to the district

36	287
44	891
36	287
46	156
36	287
55	51

court, where the judgment of the justice was reversed and set aside. The county attorney, on behalf of the state, brings the case to this court under the provisions of section 515 of the Criminal Code.

The sole question presented for our decision is, did the justice court have jurisdiction to try and sentence the defendant?

The prosecution was brought under section 30 of the Criminal Code, which reads as follows: "If any person shall abuse any judge or justice of the peace, resist or abuse any sheriff, constable, or other officer in the execution of his office, the person so offending shall be fined in any sum not exceeding one hundred dollars, or imprisoned in the jail of the county not exceeding three months, or both, at the discretion of the court."

Section 18, article VI, of the constitution reads as follows: "Justices of the peace and police magistrates shall be elected in and for such districts, and have and exercise such jurisdiction as may be provided by law; *Provided*, That no justice of the peace shall have jurisdiction of any civil case where the amount in controversy shall exceed two hundred dollars, nor in a criminal case where the punishment may exceed three months' imprisonment or a fine of over one hundred dollars, nor in any matter wherein the title or boundaries of land may be in dispute."

By the provisions of the above section of the constitution the jurisdiction of a justice of the peace is limited in criminal cases to the trial of offenses where the punishment prescribed by statute does not exceed three months' imprisonment or a fine of not more than \$100. A justice of the peace has no authority to impose both fine and imprisonment, nor to try and sentence in any case where the statute creating the offense provides that both a fine and imprisonment may be the sentence. In such case the justice can proceed only as an examining magistrate.

Applying this rule to the case before us, it is obvious that

the justice exceeded his jurisdiction both in impaneling a jury and in sentencing the defendant to pay a fine, for the reason that the section of the Criminal Code, above quoted provides that both a fine and imprisonment may be inflicted. The fact that the justice in this case only imposed a fine does not make such sentence valid. The jurisdiction of a justice of the peace in a criminal case is not determined by the punishment actually inflicted, but by the penalty provided by the statute creating the offense. If it exceeds the jurisdiction of such officer, as limited by the constitution, then the justice has no power to try or sentence.

Counsel have referred us to the case of *In re Stewart*, 16 Neb., 193. In that case Stewart was tried and convicted before a justice of an assault and battery, and sentenced to pay a fine of \$50 and imprisonment in the county jail for three months. He was discharged by this court upon *habeas corpus*, upon the ground that the sentence of imprisonment was in excess of the power of the justice. Although the opinion filed in that case contains some expressions which appear to be in conflict with the views herein expressed, the judgment then rendered is in harmony with this opinion.

Our conclusion is that the district court did not err in reversing the judgment of the justice. The exceptions taken by the county attorney are therefore overruled.

EXCEPTIONS OVERRULED.

THE other judges concur.

**FIRST NATIONAL BANK OF DENVER V. LOWREY BROS.
ET AL.**

FILED FEBRUARY 15, 1893. No. 4474.

1. **Bill of Exceptions: TIME FOR ALLOWANCE.** The cause was tried in the district court on the 17th day of December, 1889, and forty days were given to reduce the exceptions to writing. The term of court adjourned without day December 23, and on the 29th day of the following month the trial judge, on a showing of diligence, granted an extension of thirty days' additional time in which to complete and serve a bill of exceptions. A draft of the bill was served on the attorneys of the successful party on February 19, 1890. *Held*, That the same was presented in time.
2. ———: **NOTICE OF APPLICATION TO EXTEND TIME FOR ALLOWANCE UNNECESSARY.** No notice of an application to the judge for an order extending the time for preparing and serving a bill of exceptions is necessary.
3. ———: **ORDER EXTENDING TIME FOR ALLOWANCE: PRACTICE.** On the granting of such an order, the proper practice is to file the same with the clerk of the district court.
4. ———: **AMENDMENTS: NOTICE OF PRESENTATION FOR ALLOWANCE.** Where no amendments are proposed to a bill of exceptions, no notice of the presentation of the bill to the judge for allowance is required to be served on the adverse party.
5. ———: **CERTIFICATION BY TRIAL JUDGE.** Certificate of the trial judge attached to the bill in this case, although informal, is sufficient.
6. ———: A bill of exceptions must be filed in the district court of the proper county.
7. **Instructions: SUFFICIENCY OF EXCEPTIONS.** A general exception to instructions, as "to the giving of the above instructions the plaintiff then and there excepted," is insufficient to lay the foundation for their review in the supreme court. Exception should be specifically taken to each paragraph of the charge claimed to be erroneous.
8. **An erroneous instruction is not cured by merely giving another on the same subject contradicting it.**

36	290
41	71
36	290
44	610
36	290
47	319
48	297
36	290
49	323
51	156
51	216
30	290
50	339
57	198
36	290
58	14
58	201
36	290
60	732
36	290
61	215
61	254
61	586

9. **INSTRUCTIONS: EVIDENCE.** It is reversible error for the court, in its charge to the jury, to give undue prominence to a portion of the testimony by special reference thereto, or to direct the jury what weight shall be given to particular items of the evidence.
10. **Chattel Mortgages: RETENTION OF POSSESSION BY MORTGAGOR: PRESUMPTION OF FRAUD.** The retention of the possession of personal property by a mortgagor is *prima facie* evidence of fraud, and the burden is cast upon the mortgagee to establish the *bona fides* of the transaction. The presumption of fraud, arising from the want of change of possession of the thing mortgaged, is not conclusive, but may be entirely rebutted by proof of good faith and the absence of an intent to defraud.
11. ———: ———: **INSTRUCTIONS.** An instruction in a suit between the creditors of the mortgagor and the mortgagee which requires the latter, in addition to proof of good faith and absence of a fraudulent intent, to satisfactorily explain why there was not an immediate delivery of the property and an actual and continued change of possession thereof, is erroneous.
12. ———: **BILL OF SALE BY FAILING DEBTOR: FRAUD.** A mortgage or bill of sale given by a failing debtor to secure an honest debt is not fraudulent, although the parties to the transaction knew that the claims of other creditors would be thereby defeated, provided the fair value of the property pledged as security does not greatly exceed the amount of the debt, interest, and probable expenses of foreclosure.

ERROR from the district court of Harlan county. Tried below before GASLIN, J.

Case & McNeny and C. C. Flansburg, for plaintiff in error.

John P. Maule and Morning & Keester, contra.

NORVAL, J.

This cause was submitted to this court upon a motion to quash the bill of exceptions and upon the errors assigned in the petition in error. We will first consider the questions presented by the motion. Three grounds are assigned for quashing the bill.

First Natl. Bank of Denver v. Lowrey.

First—It was served upon the attorneys for the defendants in error out of time.

Second—It has never been allowed by the trial judge, or ordered made a part of the record in the case, and it does not contain all the evidence.

Third—Because said bill has not been filed in the office of the clerk of the district court.

The record before us shows that the cause was tried to a jury at the December term, 1889, of the district court of Harlan county, and that a verdict and judgment were rendered against the plaintiff in error on the 17th day of December; that forty days from the rising of the court were allowed in which to reduce exceptions to writing; that the said term of court adjourned without day on the 23d day of December, 1889; that on the 29th of the following January the trial judge, on the application of the plaintiff in error, and a showing of diligence, granted an extension of thirty days from that time in which to complete and serve the bill of exceptions; that on the 19th day of February, 1890, a draft of the bill of exceptions was presented to Morning & Keester, attorneys of record for the defendants in error, who declined to propose any amendments thereto, or to examine it, but protested against the signing of the bill by the judge or clerk, on the ground that the same had not been presented to them for examination within forty days from the final adjournment of the court.

It is plain that plaintiff's draft of the bill of exceptions was served upon the adverse parties in sufficient time. Although the forty days given from the adjournment of the term to reduce the exceptions to writing had expired, it was presented before the expiration of the additional thirty days granted by the judge. This is conceded. That the judge, under our statute, had the power to thus extend the time for preparing and serving the bill, there is no room for doubt. That no notice of the application to the judge

for an extension of time was served upon the defendants in error, or their attorney, is immaterial, since such notice is not jurisdictional. This was expressly decided in *McDonald v. McAllister*, 32 Neb., 514.

It is urged that the order of the district judge allowing the extension of time should have been attached to the proposed bill. We regard the proper practice is to file the order with the clerk of the district court, which was done in this case, immediately following the granting of the order, but it was, by inadvertence of the clerk, placed in the files of another cause, on account of which the defendants in error were not aware of the existence of the order until some time afterwards.

It is also claimed no notice of the presentation of the bill to the judge for allowance was served upon defendants in error. Mr. Flansburg, one of the attorneys for plaintiff in error, has filed an affidavit in which he states that he gave notice to the attorneys of the adverse parties of the time of the presenting of the bill to the judge for his signature. Besides, we are not aware of any statute which requires the giving of a notice in such case. It is only when amendments are proposed that notice of the time and place of presenting the bill to the judge for settlement and allowance must be given. (See Code, sec. 311.) In this case no amendments of any kind were suggested.

The second ground for quashing the bill is contradicted by the record. Appended to the bill of exceptions we find the following certificate of the trial judge:

"Febr. 26, 1890. All evidence. True bill. Ordered part of record in this case. WILLIAM GASLIN,

"Judge 8th Judicial District, Nebr."

The foregoing certificate, although quite brief, we think is sufficient.

Although we are unable to find any indorsement upon the bill showing that the same was filed with the clerk of

the district court, the evidence before us shows that it was properly filed. Mr. Flansburg, in his affidavit filed in this court in resistance of the motion, states that "after the same was allowed and signed by the judge, this affiant took the said bill of exceptions, personally, to the clerk of the district court of this (Harlan) county, and saw him, the said clerk, mark the same filed, and if the same are not so marked now on the bill of exceptions, said marking has been erased, or the leaf bearing the same destroyed. That said bill was filed the second day after it was allowed." This testimony is in no respect contradicted or denied by any one. In addition, the clerk of the district court has attached to the record a certificate, under his hand and official seal, which states "that the foregoing is the original bill of exceptions in said cause and also a true and perfect transcript of the petition, answer, reply, and instructions given in said action, as the same are on file and of record in my office." In view of the facts above stated, and inasmuch as there is no evidence before us, tending to show that the bill of exceptions was not properly filed in the district court, the third, or last, objection to the bill is overruled, and the motion to quash, therefore, must be denied.

All the parties to this suit are creditors of the Alma Milling Company, a corporation doing business at Alma, this state. On the 21st day of December, 1888, the milling company, being indebted to the First National Bank of Denver in the sum of \$10,300, executed and delivered to the bank a bill of sale upon the property in controversy, consisting of 1,425 sacks of flour and 500 bushels of wheat, for the purpose of securing its indebtedness to the bank. The bill of sale was duly filed in the proper county, on December 22, 1888, but the bank did not take immediate possession of the property under its said bill of sale, but left the property in the possession of the milling company. On the 27th day of December, 1888, the defend-

ants in error sued out writs of attachment against the milling company, and placed the same in the hands of L. E. Allen, the sheriff of Harlan county, for service, who levied the same upon the flour and wheat covered by said bill of sale. The First National Bank of Denver thereupon brought this suit against the sheriff to recover the possession of the property. Before the trial defendants in error were substituted as defendants in lieu of the sheriff. The cause was tried to a jury, who returned a verdict in favor of the defendants, upon which judgment was rendered.

The record shows that on the trial in the court below the *bona fides* of the bill of sale was questioned, and this was the principal question submitted to the jury for determination. The defendants claimed that the instrument was fraudulent as to the creditors of the Alma Milling Company, inasmuch as the bank had never taken possession of the property covered by the bill of sale, while the plaintiff insists that it accepted the bill of sale in good faith, for the purpose of securing a valid indebtedness, and without any intention of defrauding others, the creditors of the milling company, or hindering or delaying them in the collection of their debts.

The giving of the second, eighth, and ninth instructions requested by the defendants is assigned for error, which instructions are as follows:

“Second—In making it appear to you that the sale was made in good faith and without any intent to defraud the creditors of the Alma Milling Company, it is not enough for the plaintiff to show you that said Alma Milling Company owed it a debt, and that said alleged sale was made to pay or secure that debt.

“This is only one of the things it must show. It must go farther and satisfy you that the said sale was made in good faith and without any intent to defraud the creditors of the Alma Milling Company, or hinder or delay them in the collection of their debts against it.

"And they must satisfactorily explain to you why there was not an immediate delivery of said property, and an actual and continued change of possession thereof.

"And if the plaintiff has failed to satisfy you that said sale was made in good faith and without any intent to defraud, hinder, or delay the creditors of the Alma Milling Company in the collection of their claims against it; and if they have failed to satisfactorily explain to you why there was not an immediate delivery of the property and an actual and continued change of possession of the same, you should find for the defendants. Modified as follows: Provided you find from the evidence there was no change of possession of said property, and this instruction is not applicable unless you so find.

"Eighth—So, if in this case you should find from the evidence that the Alma Milling Company was in debt and could not pay its indebtedness in full, and that certain of its creditors were demanding their money and threatened suit if they were not paid, and if you also find that said milling company was owing the plaintiff, and that the plaintiff was not insisting on the payment of its claim, and was not urging that the same be secured, and if you further find that the Alma Milling Company requested plaintiff to accept this bill of sale, and that the same covered all or nearly all of the property of said company, and if you also find that there was not an immediate delivery of said property, and an actual and continued change of possession of the same, but the Alma Milling Company remained in possession of the same, and continued to run its mill and do business as it had previously done, then, and in that case, I instruct you as a matter of law that these things are strong evidence of a secret trust in favor of said Alma Milling Company, and of an intent to hinder and delay its creditors. And if from these facts and circumstances you believe there was such a trust and an intent to hinder and delay the creditors of said company you should find for the defendants.

"Ninth—It makes no difference even if the Alma Milling Company intended eventually to pay all its debts, and it makes no difference if it gave the bill of sale for the purpose of securing what it owed the plaintiff, yet, if you find from the evidence that it was the further intention of the Alma Milling Company in giving the said bill of sale to the plaintiff to hinder and delay its other creditors for a limited period only, and the plaintiff knew this, or knew enough facts to lead a reasonable man to believe such was the intention of the Alma Milling Company, the bill of sale would be void, and you should find for the defendants."

Counsel for defendants in error in their brief insist that these instructions cannot be reviewed by this court, for the reason it does not appear that the giving of these particular instructions was excepted to. The first or original transcript of the record in this case contains copies of the instructions given on the request of the defendants, following which appear these words: "To the giving of the above instructions the plaintiff there and then duly excepted." It must be conceded that this exception, under the numerous decisions of this court, some of which are cited in the brief of counsel, is too general and indefinite to lay the foundation for a review of the instructions. The rule is that each instruction, claimed to be erroneous, must be specifically excepted to. (*Brooks v. Dutcher*, 22 Neb., 644, and cases there cited.) It, however, appears from an amended transcript, filed by plaintiff in error, that it did at the time take an exception to each of the instructions copied above. The objection to our considering these instructions must, therefore, be overruled.

Section 11 of chapter 32, Compiled Statutes, declares that "every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be

accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the thing sold, mortgaged, or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale, or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers."

By this provision the legislature has made the retention of the possession of personal property, sold or mortgaged by the vendor or mortgagor, merely *prima facie* evidence of fraud, and casts the burden upon the vendee or mortgagee to establish the *bona fides* of the transaction. The presumption of fraud, raised by the statute from a want of change of possession, is not conclusive, but may be entirely rebutted by proof of good faith, and absence of intent to defraud. (*Pyle v. Warren*, 2 Neb., 252; *Robinson v. Uhl*, 6 Id., 328; *Brunswick v. McClay*, 7 Id., 137; *Jackson v. Dean*, 1 Doug. [Mich.], 519; *Hanford v. Archer*, 4 Hill [N. Y.], 271.)

The section of the statute already quoted is an exact copy of the statute of New York, and an interpretation of it by the courts of that state is entitled to great weight here. The court for the correction of errors of the state of New York, in passing upon the identical question we are considering, in the case of *Hanford v. Archer*, *supra*, in the opinion prepared by President Bradish, says: "From the declaration of the statute, that the facts enumerated therein shall be conclusive evidence of fraud, unless it shall be made to appear that the sale or assignment was made in good faith, and without any intent to defraud, the legal inference, as well as that of common sense, is, I think, irresistible, that if it be thus made to appear, those facts shall not be conclusive evidence of fraud; and that the presump-

tion of fraud raised therefrom shall be thus fully rebutted. The statute does not go on to provide that, in addition to proof of good faith and absence of intent to defraud, the party claiming under such sale or assignment shall also be held to show, by reasons to be approved by the court, why there had not been an immediate delivery, and an actual and continued change of possession." We regard this a fair and reasonable construction of our statute. When the vendee or mortgagee establishes both good faith and the absence of fraud, the legal presumption of fraud arising from his failure to take possession of the property is overcome.

By defendants' request No. 2 the plaintiff was not only required to prove good faith and the absence of an intent to defraud, but the jury were told that it "must satisfactorily explain to you why there was not an immediate delivery of said property, and an actual and continued change of possession thereof." The portion of the request just quoted was erroneous, and should not have been given. But counsel for the defendants contend that the error was cured by other portions of the charge, and the instructions, when construed together or considered as a whole, properly state the law. A misstatement of the law in one paragraph of the charge of the court cannot be cured by a correct instruction, for the reason the jury would not know which one to follow. (*Wasson v. Palmer*, 13 Neb., 376; *Ballard v. State*, 19 Id., 609; *Fitzgerald v. Meyer*, 25 Id., 77.)

The defendants' eighth request is objectionable. It not only gave undue prominence to certain portions of the evidence to the disparagement of the rest, but the jury were advised that certain things, particularly mentioned in the request to charge, "are strong evidence of a secret trust." It was the province of the jury, and not the court, to determine what weight should be given to the different items of evidence. The instruction was prejudicial to the plaintiff. (*Gillet v. Phelps*, 12 Wis., 392; *Wilcox v. Young*,

First Natl. Bank of Denver v. Lowrey.

33 N. W. Rep. [Mich.], 765; *People v. Ah Sing*, 59 Cal., 400.)

It was error to give the defendants' ninth request. The bill of sale was given to secure the *bona fide* indebtedness of the milling company to the bank. The leaving of the property in the possession of the milling company placed the burden upon the bank to overcome the legal presumption that the transaction was fraudulent, and to establish that the security was taken in good faith, and without any intent to defraud. In this state a failing debtor has the right to give one creditor adequate security upon his property to secure a *bona fide* indebtedness to the exclusion of others, and if the same is taken in good faith, without any fraudulent purpose on the part of such creditor, the transaction will not be void, even though the debtor intended thereby to hinder and delay his other creditors in the collection of their debts and the person secured had knowledge of such purpose. A party who purchases property of an insolvent debtor with notice that the purpose of the seller is to hinder and defraud his creditors, will not be protected as against such creditors, although he may have paid for the property its full value. But the same rule does not apply here. A mortgage given by a failing debtor to secure an honest debt is not in violation of any principle of law, nor is it fraudulent, although the parties knew that the claims of other creditors would be thereby defeated. (*Dudley v. Danforth*, 61 N. Y., 626; *Ford v. Williams*, 3 B. Mon. [Ky.], 556; *Worland v. Kimberlin*, 6 Id., 608; *Covanhovan v. Hart*, 21 Pa. St., 495; *Bear's Estate*, 60 Id., 436; *Walker v. Marine Nat. Bank*, 98 Id., 578.)

For the foregoing reasons the judgment of the district court is reversed and set aside, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. GREELEY COUNTY,
V. HENRY N. MILNE.

FILED FEBRUARY 15, 1893. No. 5318.

1. **De Facto Officer: PAYMENT OF SALARY: LIABILITY OF COUNTY TO DE JURE OFFICER: MANDAMUS.** Where a county has once made payment of the salary of a county office, to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterwards be compelled to pay the same salary to the *de jure* officer.

ORIGINAL application for *mandamus*.

B. F. Griffith, Coffin & Stone, and J. R. Swain, for relator.

J. R. Hanna and Robert Ryan, contra.

NORVAL, J.

This is an application to this court for a peremptory writ of *mandamus*, to compel the respondent, ex-county treasurer of Greeley county, to pay into the treasury of said county certain moneys received by him as the treasurer of said county, which he failed to pay over to his successor in office. After the issues were made up, the cause was referred to Thomas J. Welty, Esq., to take the testimony and report the same to the court, with his findings of fact. The referee, after having heard the testimony, made and returned to this court his findings.

The material facts found by the referee, stated briefly, are these: On the 5th day of November, 1889, the respondent, Henry N. Milne, and one E. F. Cashman were opposing candidates for the office of treasurer of Greeley county, in this state. On a canvass of the votes of the county, the canvassing board found that the respondent

had received a majority of the votes cast at said election for said office, and a certificate of election was duly issued to him, on November 12, 1889. The respondent subscribed to and took the oath of office required by law, and executed and filed his official bond with the proper officer, which bond was approved on the 21st day of November, 1889. Soon after the canvass of the votes was had, Cashman instituted proceedings to contest the election. A trial was had and, on the 7th day of January, 1890, the county court of said county found that said Cashman was duly elected to and was entitled to the office. From this decision respondent removed the case to the district court by appeal, and on the 27th day of October, 1891, the district court, on the evidence adduced, found that respondent received at said election 407 votes and Cashman 403, and the latter being in possession of the office, it was adjudged that he be forthwith removed therefrom, and that respondent be installed in said office. From the judgment so rendered no appeal was taken, and respondent entered upon the performance of the duties of the office on the 28th day of October, 1891, and held the office and received the emoluments thereof until the expiration of his term. After the decision of the county court, Cashman qualified and took possession of the office, performed the duties and exercised the functions thereof, and received from the county the fees and salary belonging to the office until he was removed by the said judgment of ouster. At the expiration of respondent's term as county treasurer, he retained in his hands, of the moneys collected by him for said county, the sum of \$2,783.95, which he refused to pay over to his successor, claiming the same as fees and salary of the office for the period he was excluded therefrom. Respondent has been paid the fees and emoluments of office during the time he exercised the duties of the office.

It will be observed that the respondent claims he is entitled to retain the money in controversy as fees and emol-

uments of the office of county treasurer of Greeley county during the time it was in the possession of Cashman, the latter having already received the compensation which attached to the office while the duties of the office were performed by him. The question presented for determination is, whether a *de jure* county officer can recover the salary or compensation which attaches to the office while it is in the possession of an officer *de facto*, who, before any judgment of ouster has been rendered against him, has been paid by the county the salary of the office. The question has never been passed upon by this court, and the decisions in other states are conflicting and irreconcilable. In establishing a precedent we shall adopt the rule which to us seems the best supported by reason and in harmony with judicial principles. The doctrine that the acts of an officer *de facto* are valid, so far as they affect third parties and the public, is so familiar and well settled that no citation of authorities is necessary to show it. The acts of such officer are sustained upon the ground that to question them would devolve upon every person transacting business with the officer the duty of determining for himself, at his peril, the right of the incumbent to the office he holds. Third parties assume no such risk. They are not bound to know that the person exercising the functions of a public office under color of authority is rightfully in possession of the office, but are warranted in recognizing him as the legal and valid officer, and are justified in dealing with him as such. If a person pays to a *de facto* officer the fees allowed by law for his services, he is protected, and will not be compelled to pay them the second time to the officer *de jure*. We think the same principle should govern in a case like the one at bar. Cashman was the *de facto* county treasurer of Greeley county, and performed the duties of the office under color of title from January 9, 1890, to October 28, 1891, during which time he received all the emoluments which attached to the office.

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He took possession of the office in good faith by virtue of the decision in his favor of the contest court, and continued to occupy the office until the respondent was declared to be entitled to the same by virtue of a judgment of ouster obtained by him against Cashman on the final determination of the appeal in the contest case by the district court. The county board in settling with Cashman, and allowing him the fees and salary provided by law for the period during which he performed the duties of the office, the same having been made before the respondent came into possession, had a right to rely upon the apparent title of Cashman, and to treat him as an officer *de jure*. The board was justified in allowing him the emoluments of the office upon that assumption, and the county cannot be compelled to pay them again. We are aware that courts of high authority have sustained the contrary doctrine, but the decided preponderance of authorities support the conclusion we have reached. (*Steubenville v. Culp*, 38 O. St., 18; *Wayne Co. v. Benoit*, 20 Mich., 176; *Parker v. Supervisors of Dakota County*, 4 Minn., 30; *Dolan v. Mayor*, 68 N. Y., 274; *McVeany v. Mayor*, 80 Id., 185; *Terhune v. Mayor*, 88 Id., 247; *Hagan v. City of Brooklyn*, 126 Id., 643; *Saline Co. v. Anderson*, 20 Kan., 298; *Gorman v. Boise Co.*, 1 Idaho, 655; *Shaw v. County of Pima*, 18 Pac. Rep. [Ariz.], 273; *State v. Clark*, 52 Mo., 508; *Westberg v. City of Kansas*, 64 Id., 493; *Shannon v. Portsmouth*, 54 N. H., 183.)

The Michigan case was this: Emil P. Benoit and George Miller were candidates for the office of county treasurer. The latter was declared elected by the county canvassers and entered upon the performance of the duties of the office on the first day of January, 1867, and continued in such performance until November following, when, by a judgment of ouster, Benoit was declared entitled to the office. The board of county auditors, having settled with Miller and allowed him the salary for the actual time he

held the office, refused to allow the salary for the same period to Benoit. The latter at the close of his term withheld and refused to pay to his successor \$2,583.33, that being the amount of salary for the time he was excluded from the office. In an action on his bond by the county to recover the sum so withheld, it was decided that he could not exact salary for the time Miller was actually in office.

Saline County v. Anderson, supra, was an action brought by Anderson against the county to recover \$900 claimed to be due as salary as county clerk from January 10 to October 10, 1876. It appears that Anderson and one Wildman were opposing candidates for county clerk. The former received a majority of the votes and was awarded the certificate of election. The election was contested and the contest court decided in favor of Wildman, awarding him the certificate of election and annulling Anderson's. Wildman qualified and took possession of the office on January 10. Anderson prosecuted error to the district court, and the judgment of the contest court was reversed. Wildman thereupon appealed to the supreme court, where the judgment of the district court was affirmed on December 5, 1876, and the office was delivered to Anderson. Wildman was paid the salary and fees of the office up to October 10, although the county board had during all the time full knowledge that the title to the office was in litigation and that the clerk *de facto* was insolvent. It was held that the clerk *de jure* had no cause of action against the county for such salary. Valentine, J., in delivering the opinion of the court, says: "Now as Wildman was an officer *de facto*, holding under color of title, every person had a right to recognize him as a legal and valid officer, and to treat him as such. The public, the county, the county commissioners, and private individuals had a right to do business with him as an officer, and to pay him for his services if they chose, without taking any risk of having to pay for such services a second time. It might be greatly to the interest of the public, or

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of the individuals doing business with such officer, to pay him when his fees or salary become due; and should they not be allowed to consult the interest of the public and their interests to so pay him? It is not their fault that he is wrongfully in the possession of the office; and how are they to know whether he is in the possession of the office rightfully or wrongfully? Are they bound to know who is entitled to the office in advance of any final adjudication of the question by the courts? Are they bound to anticipate the decision of the courts? And are they bound to decide the question for themselves, as it thus comes up incidentally and collaterally in the payment of fees or salary? And if they should determine that the courts would eventually decide against the officer *de facto*, must they refrain from paying him any fees or salary at perhaps a great loss to themselves or to the public? * * * Now, the interest of the public, in the 'continuous discharge' of official duties, would authorize the payment of the legal fees or salary for the performance of such official duties to the person performing the same; and to allow a person not in the possession of the office, but who claims to be entitled thereto, to sue for the fees or salary thereof, would be to allow the question of the title to the office to be raised and determined against the officer *de facto* in a controversy in which he was not a party, and in which he could not be heard? Such certainly could not be allowed. But if this suit can be maintained, then it would be allowed. * * * It must be remembered that Wildman was not a mere usurper; but he was an officer *de facto*, having possession of the office under color of title. What would be the rule if he were a mere usurper, it is not necessary for us to decide in this case. All that we now decide is, that where a person is in the possession of the office of county clerk, under color of title, and is the county clerk *de facto*, and claims to be the county clerk *de jure*, and the board of county commissioners pays to him the salary due to the rightful incumbent of

such office, the county clerk *de jure* has no action against the county board for such salary, and this notwithstanding the fact that the county board may have known at the time they paid said salary that the question as to the title of the office was in litigation, and notwithstanding the fact that the county clerk *de facto* may be insolvent. The remedy of the county clerk *de jure* in such a case is an action against the county clerk *de facto*."

The supreme court of New York in *Dolan v. Mayor, supra*, in passing upon a case quite similar to the one at bar, held that the payment of the salary to an officer *de facto*, made while he was in possession, is a good defense to an action by the *de jure* officer to recover the same salary. This decision has been followed with approval by the same court in subsequent cases.

We are of the opinion that the respondent is not entitled to the money retained by him. He must pay the same to the county treasurer of Greeley county. A peremptory writ is allowed as prayed.

WRIT ALLOWED.

THE other judges concur.

36	307
36	319

WILLIAM H. STERNBERG V. STATE OF NEBRASKA.

FILED MARCH 1, 1893. No. 5198.

1. **Street Railways: CONTROL BY MUNICIPALITY: COMMUTATION TICKETS.** The street railway of the city of Lincoln is so far under the control of the municipality that the latter may fix the rates of fare for passage over said railway, and may require tickets six for twenty-five cents to be kept for sale by each conductor of a street car.
2. **—: —: —.** A street railway has no depots. Its stopping places are on each street corner and it transacts its business with the public in its cars, and its tickets should be kept for sale where it transacts its business with the public.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

William G. Clark, for plaintiff in error:

The ordinance requiring the street railway company to constitute its conductors agents for the sale of tickets is illegal and void. It is unreasonable and exceeds the police power of the state. The court has held a rule of a railroad company requiring passengers on freight trains to purchase tickets before entering the cars to be reasonable, and that non-compliance may be lawfully followed by expulsion, even when the offending passenger had no knowledge of the rule. (*Burlington & M. R. Co. v. Rose*, 11 Neb., 177; *Chicago & A. R. Co. v. Flagg*, 43 Ill., 364; *Arnold v. Illinois C. R. Co.*, 83 Id., 273; *Eaton v. Delaware, L. & W. R. Co.*, 15 Am. Rep., 513; *Cleveland, C. & C. R. Co. v. Bartram*, 11 O. St., 457; *Law v. Illinois C. R. Co.*, 32 Ia., 536.) A railroad company has a right to decide what grade or class of employes shall receive and handle its money. This rule is reasonable for the protection of the company against speculation and fraud. (*Cleveland, C. & C. R. Co. v. Bartram*, *supra*.) A carrier of passengers may require passengers to purchase tickets before entering the car or to submit to a penalty in the form of an increased toll for failure so to do. (*Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill., 499; *Shelton v. Lake Shore & M. S. R. Co.*, 29 O. St., 214; *Downs v. New York & N. H. R. Co.*, 36 Conn., 287.) The spirit of modern legislation forbids discrimination in favor of a large patron, and requires of the carrier equal rates to all. The courts hold that such right exists at common law. (*Cock v. Chicago, R. I. & P. R. Co.*, 81 Ia., 561.) The powers of the city council have been prescribed at great length and with minute detail. The careful enumeration of such powers is in itself by all recognized canons of construction

a limitation thereof. The powers of a corporation, municipal or private, are limited to the privileges expressly conferred by its charter, or necessary to the enjoyment of such express privileges. (*Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St., 351; *Logan v. Pyne*, 43 Ia., 525; 2 Kyd, Corp., secs. 102-107; Willcock, Mun. Corp., 14 L. L., sec. 769; Ang. & A., Priv. Corp., 111-239; 1 Dillon, Mun. Corp. [4th ed.], sec. 89.) For all purposes of jurisdiction corporations, municipal, are like inferior courts and must show the power given them in every case. If wanting, their proceedings must be holden void. (*Dunham v. City of Rochester*, 5 Cow. [N. Y.], 465; *Bloom v Xenia*, 32 O. St., 461; *State v. Atchison & N. R. Co.*, 24 Neb., 143; *Rochester v. Collins*, 12 Barb. [N. Y.], 559; *Grand Rapids v. Hughes*, 15 Mich., 54; *Horn v. People*, 26 Id., 224; *Eichels v. Evansville Street R. Co.*, 78 Ind., 261; *Huesing v. Rock Island*, 128 Ill., 465; *Brenham v. Brenham Water Co.*, 67 Tex., 542; *Spengler v. Trowbridge*, 62 Miss., 46; *Reed v. Toledo*, 18 O., 161; *Des Moines v. Gilchrist*, 67 Ia., 210; *Thomson v. Roe*, 22 How. [U. S.], 422; *Andrews v. Union Mutual Ins. Co.*, 37 Me., 256. *Thomas v. Richmond*, 12 Wall. [U. S.], 349; *Clark v; Davenport*, 14 Ia., 494; *Merriam v. Moody*, 25 Ia., 163.)

George H. Hastings, Attorney General, and Adams & Scott, for the state :

Under a city charter giving the council power to pass all ordinances necessary for the due administration of justice and the better government thereof, and to cause the removal or abatement of any nuisance, a passage of an ordinance requiring the street car company to put a driver and a conductor on each car is a proper exercise of the police power and not an infringement of the company's rights, not being unreasonable or oppressive. (*South Covington & C. St. R. Co. v. Berry*, 18 S. W. Rep. [Ky.], 1026.) A provision in such ordinance requiring the police to cause

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every car not provided with a driver and conductor to be returned to the stable is not an attempt at enforcement without trial, but merely a means of preventing a nuisance by blockading travel. (*South Covington & C. St. R. Co. v. Berry, supra.*) An ordinance enacting that it shall not be lawful for any horse railway company, without having an agent in addition to the driver to assist in controlling the car and passengers, and to prevent accident and disturbance of the company, and to maintain order and secure the safety of the passengers is a reasonable regulation, and a valid exercise of the general police power vested in a city by its charter. (*State v. Trenton*, 20 Atl. Rep. [N. J.], 1076.) The doctrine of the New York cases is, that a passenger lawfully upon a train has a right to resist any attempt to remove him therefrom; and if, in consequence of his resisting, extraordinary force is used to remove him and he is injured thereby, he may recover. (*English v. Delaware & H. Canal Co.*, 66 N. Y., 455, 23 Am. Rep., 69; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y., 343, 80 Am. Dec., 286.) In California it is provided by statute that the company must furnish tickets or checks to all passengers who apply for them. (Rev. Stats. Cal., 1882, sec. 502.) In Massachusetts, statutory regulations have been enacted with reference to the removal of snow and ice. (Rev. Stats. Mass., 1882, p. 113, sec. 26.) New York has a similar provision. (Rev. Stats. N. Y., 1889, ch. 252, sec. 9.) In New York a city ordinance has been sustained which prohibited the use of sand on the tracks. (*Drydock, E. B. & B. R. Co. v. New York*, 47 Hun [N. Y.], 221; Booth, Street Railway Law, p. 336.) And an ordinance of Philadelphia was sustained as a proper police regulation which required passenger cars to be numbered and licensed on the payment of a stipulated fee. (*Frankford & P. P. R. Co. v. Philadelphia*, 58 Pa. St., 119; Booth, Street Railway Law, p. 336.) Under the powers inherent in every sovereignty, a government may regulate the conduct of its

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citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. (Booth, Street Railway Law, p. 319; *Munn v. Ill.*, 94 U. S., 113; *Chicago, B. & Q. R. Co. v. Ia.*, 94 U. S., 155; *McAunich v. Mississippi & Mo. R. Co.*, 20 Ia., 343.) After a railroad company has received authority to use the streets it is subject, not to the charter conditions alone, but also to such further police regulations as the public safety and convenience may require. (Horr & Bemis, Mun. Pol. Ord., sec. 211; *St. Louis v. St. Louis R. Co.*, 89 Mo., 44.) Corporations chartered to do business in a city are to be regarded as inhabitants of the city, and unless exempted are subjected to its ordinances. (*Frankford & P. P. R. Co. v. Philadelphia*, 58 Pa. St., 119, *supra*.) A street railway company is a common carrier of passengers, with duties and responsibilities similar to those of a railroad company. (Booth, Street Railway Law, p. 442, sec. 324.) State or municipality has a right to regulate fare charged. (*Wakefield v. South Boston R. Co.*, 117 Mass., 544; *Buffalo Eastside R. Co. v. Buffalo St. R. Co.*, 111 N. Y., 132, 139; *Blake v. Winona & St. P. R. Co.*, 19 Minn., 418; *Illinois C. R. Co. v. People*, 95 Ill., 313; *Camden & A. R. Co. v. Briggs*, 22 N. J. L., 623.) Mr. Bush was within the law, and the conductor was without the law, and when the conductor refused to give Mr. Bush the package of tickets for Bush's twenty-five cents, he violated the law of the city. So the doctrine that a passenger lawfully upon a train has a right to resist any attempt to remove him therefrom, applies. (*English v. Delaware & H. Canal Co.*, 66 N. Y., 455, 23 Am. Rep., 69; *Sanford v. Eighth Ave. R. Co.*, 23 N. Y., 343, 80 Am. Dec., 286.)

N. Z. Snell, also, for the state.

MAXWELL, CH. J.

The plaintiff in error was convicted of assault and battery, and judgment rendered against him on the verdict.

The case was submitted to the court below on the following stipulation of facts:

"It is hereby stipulated and agreed that the Lincoln Street Railway Company is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, running and operating in the city of Lincoln a line of street railway, and that on the 31st day of July, 1891, William H. Sternberg was a conductor on one of the cars of said company, and on the 27th day of August, 1891, A. L. Rice was also a conductor on one of said company's cars; that on the 31st day of July, 1891, one George H. Bush got upon one of the cars of the said company, on which William H. Sternberg was conductor, and demanded of the said conductor that he sell to the said George H. Bush six Lincoln street railway tickets for twenty-five cents, and that the said George H. Bush offered to pay to the said William H. Sternberg, as conductor, the sum of twenty-five cents for said tickets, and that Mr. Bush demanded a package of six tickets for twenty-five cents, and manifested a willingness to pay one of the six tickets to the conductor whenever said tickets were delivered to him, and whenever said package of tickets were delivered to him he was ready to pay and deliver the twenty-five cents, and for that purpose held the twenty-five cents in his hand in full view, and that said Sternberg refused to give him a package of six tickets for twenty-five cents, but on the contrary demanded of said George H. Bush that he pay the five cent fare, which was the customary charge for a single passage on the car, and that the said George H. Bush refused to pay the said five cent fare on said demand, and thereupon the said Sternberg notified him that he would have to leave said car, which the said Bush declined to do, and thereupon the said William H. Sternberg attempted to forcibly eject and evict said party from said car; the said Bush resisted, and the said Sternberg was unable by himself to put said party off, and

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thereupon called to his assistance other parties; that the said Sternberg and the parties he called to his assistance took hold of and laid their hands upon the said Bush, said Bush all the time resisting with all his power, and the said Sternberg and the persons helping him overcame said Bush's resistance and forcibly ejected him from the car, said Sternberg and his assistants using, however, no more force than was necessary to overcome the resistance of Bush and put him off; that on the 27th day of August, 1891, A. L. Rice was a conductor on one of the cars of the said street railway company, and that on the said date one Edwin P. Le Fevre got upon said car on which the said Rice was conductor, to ride, and when he was asked for his fare by the said conductor the said Le Fevre demanded of the said A. L. Rice, conductor, that he sell to him six tickets for twenty-five cents, and the said E. P. Le Fevre was ready and willing, and tendered to the said conductor the twenty-five cents for the tickets, and the said conductor refused to sell said tickets to the said E. P. Le Fevre, but demanded of him five cents, which was the customary fare charged by the said company for a passage upon its cars, and the said Le Fevre refused to pay the same, but insisted on being sold six tickets for twenty-five cents, out of which he would pay to the conductor his fare for said passage; the said A. L. Rice, as conductor, still refusing to sell said tickets and insisting upon the said Le Fevre paying the five cent fare, which Le Fevre refused to do, and thereupon A. L. Rice laid his hands upon the said Le Fevre and forcibly evicted said Le Fevre from the car; that on both of said dates there was a rule and regulation made by said street car company by which its conductors were required to eject and put off from its cars any person who attempted to ride without paying the customary fare; that on all of the cars of the Lincoln Street Railway Company the fares are paid directly to the conductors and not dropped into the cash box, and if the conductors are re-

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quired to sell tickets they would be obliged to handle the cash fares as well as those paid by tickets; that both the said E. P. Le Fevre and George H. Bush had ridden upon the said cars prior to these dates, and had attempted to buy six tickets for twenty-five cents from the conductors, and had been refused and had been notified that said conductors did not sell tickets on the cars; that prior to the putting on of the electric cars on the line of the street railway company all its lines had been operated by horse cars, and under the system as operated by horse cars there was only one man to the car, and he was the driver; and that all fares paid by the passengers on said cars were dropped into a cash box instead of being paid directly to the driver or conductor; that under said system it had been customary for several years for the driver on the horse cars to sell to passengers six tickets for twenty-five cents, as required by an ordinance of the city of Lincoln; that during the spring of '91 said system of street cars changed from horse cars to electricity, and that under said system all the fares, both cash and otherwise, are paid directly to the conductor; that under the present system of operating said street railway the various railroad ticket agents in the city sell tickets twenty-four for \$1, instead of the conductor selling six for twenty-five cents to passengers; that the number of people who ride upon the cars of the Lincoln street railway per day is, upon an average, about 7,000, and about one-half of these would buy tickets of the conductors if six for twenty-five cents were sold by the conductor; that on said date there was in force an ordinance of the city of Lincoln in the words and figures following:

"1167. No company shall charge or receive more than five cents fare for each passenger carried on any of said roads, nor more than twenty-five cents for each package of six tickets.

"1168. Every street railroad company in this city shall keep for sale by the conductor or driver of each car pack-

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ages of tickets of the required number for twenty-five cents each, ready for delivery during the running of the car to any passenger applying and paying for the same.

"1170. It shall be unlawful for any person to ride upon any street railroad car in the city of Lincoln without paying the customary fare (unless exempt by the rules of the company owning said railroad).

"1172. Any person who shall violate any of the provisions of this article shall, upon conviction thereof, be fined in any sum not exceeding \$100, and be committed until such fine and prosecutions are paid."

On page 457 of the Municipal Code is an ordinance which provides as follows (referring to the Lincoln Street Railway Company): "Said railway company shall be subject to all reasonable regulations in the construction and use of said railway which may be imposed by ordinances."

On the trial of the cause the court instructed the jury as follows:

"The jury are instructed that the complaint charges that the defendant, on the 31st day of July, 1891, in the county of Lancaster and state of Nebraska and within the corporate limits of the city of Lincoln, did unlawfully in and upon one George H. Bush make an assault, and did then and there unlawfully strike and wound him, the said George H. Bush.

"2. The assault of the defendant upon the person of George H. Bush at the time and place alleged in the complaint is admitted by the defendant, and your verdict should be guilty as charged."

The jury returned a verdict finding Sternberg guilty as charged, and he was fined \$5 and costs. The defense is made by the street railway company. The reasons set forth by it in its brief for holding the judgment erroneous are as follows:

"1. The ordinance requiring the street railway company to constitute its conductors agents for the sale of tickets was illegal and void.

"a. Because such requirement is unreasonable in law and in excess of the police power of the state.

"b. Because the council of the city of Lincoln was without power to enact such requirement.

"2. Because the complaining witness was himself a wrong-doer and voluntarily provoked and brought upon himself the alleged assault and was in any event rightfully ejected from said car.

"3. The ordinance is unreasonable and exceeds the police power of the state.

"4. The ordinance, which has no parallel in adjudged cases or in current history of municipal regulations, appears to have been suggested from the fact that at an early day when the cars were operated by mules or horses in charge of a single driver, the street railway company, or more exactly its predecessor, had sold tickets at the rate of six for twenty-five cents through the drivers. The drivers, however, were not permitted to take up such tickets or to collect fares, which, in each case, the passenger must personally deposit in a fare box. The driver was required to make change when necessary in a limited amount, but even then was not permitted to retain and deposit the fare. He returned the whole amount to the passenger, who dropped the fare into the box. Every one accustomed in those days to use the cars knows that this rule was rigidly enjoined and enforced, and that even for the aged or for women with children the driver was unable, on request, to receive or deposit the fare. Under rapid (electrical) transit, and with increased numbers of passengers, public safety requires, in most cases, two men instead of one to manage the cars, and public convenience demands, whether reasonable or not, that the conductor collect the fares. These great improvements render the sale of tickets by conductors unsafe and impracticable. The stipulation shows that a year ago the street railway company was carrying 7,000 passengers daily and that at least one-half would in any event pay cash. The con-

ductors then would receive \$175 in cash and an equivalent of \$140 in tickets. These amounts are constantly increasing, because Lincoln is a growing city and more persons use the cars each year. The opportunity for fraud and theft on the part of the conductor is manifest. A conductor on a crowded line might receive and does receive \$15 to \$30 daily. For half or two-thirds of the cash taken at the rate of five cents per fare he can substitute tickets necessarily in his possession at the rate of four cents per fare, embezzling daily from fifty cents to \$2—\$15 to \$60 per month. The ratio of tickets to fares is necessarily uncertain and variable on different lines and dates. Detection even by secret service would be impossible, because a detective to form a correct judgment would watch so closely as to disclose his purpose."

The assertion that the ordinance in question is without a parallel in the current history of municipal regulations is not borne out by the cases cited. On the contrary street railways are constructed for the convenience of the public. The cars necessarily pass over a certain prescribed portion of the streets occupied by their tracks. Every street corner is a station where passengers may be received and discharged. The streets are for the benefit of all—the public generally as well as the portion represented by the street railway company. Now, as the company is permitted to use the public streets and along their tracks have a right of way on which it is entitled to preference over other vehicles passing along the streets, it necessarily follows that the general regulations and control of such railways are under the police powers in the city government, and the municipality may enact all reasonable rules for that purpose. (*South Covington & C. S. Ry. Co. v. Berry*, 18 S. W. Rep. [Ky.], 1026; *State v. Trenton*, 20 Atl. Rep. [N. J.], 1076; *St. Louis v. St. Louis R. Co.*, 89 Mo., 44.)

It will be observed in the case at bar that on page 457 of Municipal Code of Lincoln it is provided that "said

railway company shall be subject to all reasonable regulations in the construction and use of said railway which may be imposed by ordinances." The constitution of 1875, to prevent favoritism and fraud, required the consent of a majority of the electors thereof of any city, town, or incorporated village to the construction of a street railway. (Const., art. XIII, sec. 2). This, therefore, was the proposition submitted to the electors and accepted by them and the street railway company. In addition to this, paragraph 16, section 67, chapter 14, of the statute of 1889 grants the general power "to regulate and prescribe the manner of running street cars, to require the heating and cleaning of the same, and to fix and determine the fare charged."

It is claimed on behalf of the company that the power "to fix and determine the fare charged" does not confer the power to require tickets to be sold at all, and therefore that no authority for that purpose exists in favor of the city. This is begging the question. The power to fix the rates of fare necessarily carries with it all incidents necessary to carry the power into effect. Thus, for a single passage the fare is five cents. If six trips are to be made the price is fixed at six for twenty-five cents. A street railway has no depots. Its stations are the street corners and its business with the public is conducted on its cars. Is it unreasonable to require the company to sell its tickets at its places of doing business? We think not. The plea that it is liable to be defrauded by its employees if it sells tickets on the cars we believe does injustice to many faithful, reliable, and diligent persons whose integrity is above question, and is a mere pretext to evade the ordinance requiring tickets to be sold on the cars, as it will readily be seen from the stipulation of the facts that it is for the interest of the company not to sell tickets but to collect fares in cash. But even if the claim on behalf of the company is true, which we do not believe, it must comply with the ordinance. The question is one of power, and the power of the city

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over the street railway is full and ample, and the requirement is reasonable and the company must perform on its part. Mr. Bush therefore had a right to demand six tickets of the plaintiff in error on offering to pay for the same and the plaintiff in error was guilty of a wrong in ejecting him from the cars. The judgment is right and is

AFFIRMED.

THE other judges concur.

E. L. RICE V. STATE OF NEBRASKA.

FILED MARCH 1, 1893. No. 5197.

ERROR to the district court for Lancaster county. Tried below before **TIBBETS, J.**

William G. Clark, for plaintiff in error.

George H. Hastings, Attorney General, *Adams & Scott*, and *N. Z. Snell*, for the state.

MAXWELL, CH. J.

The questions involved in this case are identical with those in *Sternberg v. State*, just decided, *ante*, p. 307, and the same judgment will be entered. The judgment of the district court is therefore

AFFIRMED.

THE other judges concur.

MARTIN J. O'GRADY V. STATE OF NEBRASKA.

FILED MARCH 1, 1893. No. 5652.

1. **Criminal Law: INSANITY FROM INTOXICATION: EXCUSE FOR CRIME: EVIDENCE.** Intoxication is no justification or excuse for crime; but evidence of excessive intoxication by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime had been committed, or to determine the degree where the offense consists of several degrees.
2. **Instructions set out in the record should be qualified as above.**

ERROR to the district court for Johnson county. Tried below before BABCOCK, J.

Daniel F. Osgood, for plaintiff in error.

George H. Hastings, Attorney General, for the state.

MAXWELL, CH. J.

The plaintiff in error was convicted of attempting to pass a forged check and was sentenced to imprisonment in the penitentiary for two years. All the testimony in the case upon that point tends to show that the plaintiff in error was intoxicated at the time, and the question presented is to what extent, if at all, excessive drunkenness not entered into for the purpose of committing crime may be considered by the jury in determining the intention of the accused. The court instructed the jury: "The jury are instructed that voluntary intoxication or drunkenness is no excuse for a crime committed under its influence, nor is any state of mind resulting from drunkenness, short of actual insanity or loss of reason, any excuse for a criminal act. Where without intoxication the law would impute a criminal intent, proof of drunkenness will not avail to disprove

36 390/
42 525/
36 390/
56 617,

such intent where the drunkenness is voluntary." It will be observed that the instruction contains two propositions, viz., that drunkenness is no excuse for crime unless it produces actual insanity or loss of reason, and, second, that where the intoxication is voluntary, proof of intoxication cannot be considered to disprove intent. The rule as stated in the second part of the instruction, being without qualification, is too broad. While it is true that intoxication is not a justification or excuse for crime it is also true that at the present time evidence of intoxication may be admitted to determine whether or not a crime has been committed or where it consists of several degrees depending on the intent, the grade of the offense.

Cline v. State, 43 O. St., 334, 335, which in our view states the law correctly, is as follows: "Where a person having the desire to do to another an unlawful injury, drinks intoxicating liquors to nerve himself to the commission of the crime, intoxication is held, and properly, to aggravate the offense; but at present the rule that intoxication aggravates crime is confined to cases of that class. The rule is well settled that intoxication is not a justification or an excuse for crime. To hold otherwise would be dangerous to and subversive of public welfare. But in many cases evidence of intoxication is admissible with a view to the question whether a crime has been committed, or where a crime consisting of degrees has been committed, such evidence may be important in determining a degree. Thus, an intoxicated person may have a counterfeit bank bill in his possession for a lawful purpose, and intending to pay a genuine bill to another person may, by reason of such intoxication, hand him the counterfeit bill; as intent in such case is of the essence of the offense, it is possible that in proving intoxication you go far to prove that no crime was committed. (*Pigman v. State*, 14 Ohio, 555.) So where the offense charged embraces deliberation, premeditation, some specific intent, or the like, evidence of intoxication

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may be important, and it has frequently been admitted. (Id.; *Nichols v. State*, 8 O. St., 435; *Davis v. State*, 25 Id., 369; *Lytle v. State*, 31 Id., 196.) The leading case of *Pigman v. State* has been repeatedly cited with approval (*People v. Robinson*, 2 Park., 235; *People v. Harris*, 29 Cal., 678; *Roberts v. People*, 19 Mich., 401; *State v. Welch*, 21 Minn., 22; *Hopt v. People*, 104 U. S., 631; *State v. Johnson*, 40 Conn., 136), and no doubt the law upon the subject is correctly stated in that case, and that the rule as there expressed is humane and just, but there is always danger that undue weight will be attached to the fact of drunkenness where it is shown in a criminal case, and courts and juries should see that it is only used for the purpose above stated, and not as a cloak or justification for crime. See, also, *U. S. v. Drew*, 5 Mason, 28; s. c., 1 Lead. Crim. Cas. [2d ed.], 131, note; *Reg. v. Davis*, 14 Cox, C. C., 563; s. c., 28 Moak Eng. Rep., 657; note, *Lawson on Insanity*, 533-768, where all the cases are collected relating to the admissibility and effect in criminal cases of proof of intoxication."

Drunkenness is not favored as a defense, and in *Johnson v. Phifer*, 6 Neb., 402, this court held that it could not relieve a party from a contract on the ground that he was drunk when it was entered into unless his condition reached that degree which may be called excessive drunkenness, where a party is utterly deprived of reason and understanding. This, in our view, is the true rule. As much as we may desire to discourage drunkenness, and deplorable as the habit of drinking, with its train of wrecks and ruin, may be, we must still recognize the frailty of human beings, and adapt the law to the actual condition of the party.

In *Pigman v. State*, *supra*, it is said: "The older writers regarded drunkenness as an aggravation of the offense and excluded it for any purpose. It is a high crime against one's self, and offensive to society and good morals; yet

every man knows that acts may be committed in a fit of intoxication which would be abhorred in sober moments. And it seems strange that any one should ever have imagined that a person who committed an act from the effect of drink which he would not have done if sober, is worse than the man who commits it from sober and deliberate intent. The law regards an act done in sudden heat, in a moment of frenzy when passion has dethroned reason, as less criminal than the same act when performed in the cool and undisturbed possession of all the faculties. There is nothing the law so abhors as the cool, deliberate, and settled purpose to do mischief. That is a quality of a demon; whilst that which is done on great excitement, as when the mind is broken up by poison or intoxication although, to be punished, may to some extent be softened and set down to the infirmities of human nature. Hence, not regarding it as an aggravation, drunkenness, as anything else showing the state of mind or degree of knowledge, should go to the jury. Upon this principle, in modern cases, it has been permitted to be shown that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of the mind necessary to constitute murder in the first degree. The principal is undoubtedly right. So, on a charge of passing counterfeit money; if the person is so drunk that he actually did not know that he had passed a bill that was counterfeit, he is not guilty. It oftentimes requires much skill to detect a counterfeit. The crime of passing counterfeit money consists of knowingly passing it. To rebut that knowledge, or to enable the jury to judge rightly of the matter, it is competent for the person charged to show that he was drunk at the time he passed the bill. It is a circumstance, among others, entitled to its just weight."

If he was so drunk as to be deprived of reason and understanding, that is a fact for the jury to consider with the other facts proved, in determining the guilt or innocence of

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accused. The judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

FRANK P. KETCHELL V. STATE OF NEBRASKA.

FILED MARCH 1, 1893. No. 5942.

1. **False Pretenses.** In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses, with the intent to cheat and defraud.
2. ———: **EVIDENCE.** The proof tends to show that the accused acted in good faith and in the reasonable belief that the draft would be paid.

ERROR to the district court for Douglas county. Tried below before DAVIS, J.

V. O. Strickler and *E. R. Duffie*, for plaintiff in error.

George H. Hastings, Attorney General, for the state.

MAXWELL, CH J.

The plaintiff in error was informed against by the county attorney of Douglas county for obtaining money by false pretenses. There are four counts in the information for separate transactions, which are alike, except as to dates and amounts. On the trial the jury found the plaintiff in error not guilty upon the first, second, and third counts of the information, but guilty on the fourth count, and he was sentenced to imprisonment in the penitentiary for three years. The fourth count is as follows:

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"And the said Timothy J. Mahoney, county attorney, on his oath aforesaid, further gives the court to understand and be informed that said Frank P. Ketchell, on or about the 20th day of November, 1891, in the county of Douglas and state of Nebraska aforesaid, then and there being, and then and there intending, unlawfully, falsely, fraudulently, and feloniously to cheat and defraud one Oliver C. Campbell, did then and there unlawfully and feloniously pretend and represent to Oliver C. Campbell, and to one Henry Bloomer, the clerk and agent of said Oliver C. Campbell, which said representation was communicated to said Oliver C. Campbell, and which said communication was made by the said Frank P. Ketchell to the said Henry Bloomer for the purpose of being by the said Henry Bloomer the clerk and agent of the said Oliver C. Campbell, communicated to the said Oliver C. Campbell that one Farrand Ketchell, residing at or near Newark, in the state of New Jersey, was then and there a wealthy man, who had a large amount of property and money over and above his exemptions and liabilities, and who was then and there amply able to pay a certain draft upon said Farrand Ketchell in the sum of \$350, and that the said Farrand Ketchell would pay said draft, and as soon as presented, and that the said Farrand Ketchell was then and there owing and indebted to the said Frank P. Ketchell an amount of money in excess of said sum of \$350, out of which amount said Farrand Ketchell could pay said draft, and did then and there request said Oliver C. Campbell to indorse a draft drawn through the Omaha National Bank of the city of Omaha, upon the said Farrand Ketchell, at Newark, state of New Jersey, to enable the said Frank P. Ketchell to obtain from said Omaha National Bank the said sum of \$350, the amount of said draft; that, relying upon said pretenses and representations and believing the same to be true, the said Oliver C. Campbell did then and there indorse his name across the back of said

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the draft, and the said Henry Bloomer, agent and clerk of the said Oliver C. Campbell, did then and there present said draft to said Omaha National Bank of the city of Omaha, in the county of Douglas, and on faith and credit of the said indorsement of the said Oliver C. Campbell said Omaha National Bank did then and there pay and deliver to the said Henry Bloomer the amount of said draft, to-wit, the sum of \$350, which said money so received upon the faith and credit of the said indorsement of the said Oliver C. Campbell, the said Henry Bloomer, agent and clerk of the said Oliver C. Campbell, did then and there, by reason of the said pretenses and representations, pay and deliver over to the said Frank P. Ketchell, and the said Frank P. Ketchell then and there, by said false pretenses and representations, did then and there obtain through the said Henry Bloomer from the said Oliver C. Campbell said sum of \$350, lawful money of the United States, of the value of \$350, the property of the said Oliver C. Campbell; that the said pretenses and representations were then and there wholly false and untrue, and the said Frank P. Ketchell, residing at or near Newark, New Jersey, was not then and there a man of great wealth and had not then and there property and money sufficient to pay said draft, over and above his liabilities and exemptions and was not then and there able to pay said draft, and the said Farrand Ketchell was not then and there indebted to the said Frank P. Ketchell in a sum sufficient to pay said draft, and had no funds whatever of the said Frank P. Ketchell out of which to pay said draft, all of which said representations the said Frank P. Ketchell well knew to be wholly false and untrue, and which said representations the said Frank P. Ketchell then and there made with the intent then and there to defraud the said Oliver C. Campbell, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska."

Farrand Ketchell is the father of the plaintiff in error.

His testimony was taken by deposition, and, in substance, is that the plaintiff in error had authority to draw on him, and had done so for many years; that he had paid all such drafts prior to the ones mentioned in the information; that after about September 1, 1891, to the time the last of the drafts in question was drawn, the plaintiff in error had drawn on him for about \$3,000, of which he had paid \$1,700; that one of the reasons why he refused to pay the drafts in question was that he feared his son was being defrauded. It also appears that the drafts in question were accepted and judgment has been recovered thereon. He also testifies that a trust fund in favor of his son has been under his control, and that no settlement had ever taken place with the son. The testimony also shows that the first, second, and third drafts involved in the information had been accepted before Mr. Campbell indorsed the fourth one, and that he had notice to that effect, and it is evident, relied to a considerable extent thereon. Now, upon such proof, can a conviction for obtaining money by false pretenses be sustained? We think not. All the proof tends to show that when the plaintiff in error drew the draft in question he had reason to believe that it would be accepted and paid. To constitute the crime charged it is essential that there should be an intent on the part of the accused to cheat and defraud. (*People v. Kendall*, 25 Wend. [N. Y.], 399; s. c., 37 Am. Dec., 240; *Clark v. People*, 2 Lans. [N. Y.], 332; *Brown v. People*, 16 Hun [N. Y.], 537.) Such proof, no doubt, may be shown by circumstances. The proof in this case is insufficient to show an intent to defraud, and therefore the verdict must be set aside. It is pretty evident from the testimony, however, that the plaintiff in error should engage in some lawful employment and support himself. He seems to have reached the limit of his father's ability to maintain him and pay his bills, and drafts hereafter drawn and unpaid may, in all probability, place him in the attitude of procuring money thereon by false

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pretenses. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

86 328
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WILLIAM GRIFFIN, APPELLEE, v. HATTIE E. CHASE
ET AL., APPELLANTS.

FILED MARCH 1, 1893. No. 4731.

1. **Banks: COLLECTIONS: TRUST FUNDS: INSOLVENCY: AGENCY.**
A national bank received certain real estate mortgages and notes for collection and to remit the proceeds to the owner when collected. This was done with all but two mortgages which were collected by the president of the bank. The bank failed soon after the last collection spoken of and had been insolvent for several months before that time. *Held*, That the bank was the agent of the owner of the instruments above set forth, and that the money derived therefrom was a trust fund which did not become a part of the assets of the bank, and that the receiver thereof had no right to said fund or any part thereof.
2. **Mortgages: CONSIDERATION: COLLECTIONS ON SECURITIES BY PRESIDENT OF INSOLVENT BANK.** *Held*, That a mortgage executed by J. O. C. and wife was made to secure moneys received by J. O. C.
3. **The right of the wife to have certain real estate of the husband applied to the satisfaction of the mortgage before resorting to her estate or the homestead, held for further argument and consideration.**

APPEAL from the district court of Fillmore county.
Heard below before MORRIS, J.

Charles Offutt, for appellant Edward E. Balch, receiver.

J. W. Eiler and *A. A. Whitman*, for appellant Hattie E. Chase.

Charles E. Magoon and Will R. Gaylord, for appellee.

MAXWELL, CH. J.

This is an action to foreclose two real estate mortgages given by the defendants Chase and wife upon lots 762, 763, 764, 765, 766, also lots 748, 749, 750, 751, 752, 753, lots 752 to 766 inclusive, and 748 to 753 inclusive in the town of Fairmont, in said Fillmore county, Nebraska. Of the above lots No. 767 is the sole property of Hattie E. Chase, the wife of J. O. Chase, and lots 765 and 766 are occupied as a homestead by Chase and family. The proof tends to show the following facts: In December, 1887, and January and February, 1888, the plaintiff, who resides in the state of New York, held a number of mortgages on real estate in Fillmore county which were payable at the Fillmore County Bank, and were then maturing. The evidence of these mortgage debts, together with releases, were sent by the plaintiff direct to the First National Bank of Fairmont with instructions to collect the amounts due in each instance and remit to him and deliver the respective releases on payment being made in full. In the progress of these transactions it appears that Griffin sent to this bank the following notes and mortgages:

Dec. 27, 1887, note of Campbell.....	\$1,080 00
Dec. 27, 1887, note of Sikes.....	1,296 00
Dec. 27, 1887, note of Brown.....	540 00
Dec. 27, 1887, note of Watt.....	1,080 00
Dec. 27, 1887, note of Austin	540 00
Jan. 27, 1888, note of Heller.....	756 00
Mar. 6, 1888, note of Logsdon.....	459 00
Mar. 6, 1888, note of Holcomb.....	1,080 00
Total.....	<u>\$7,075 00</u>

The bank collected all of the above, except the notes of Logsdon and Holcomb, and remitted the same to the plaintiff.

iff. J. O. Chase, the president of the First National Bank of Fairmont, personally received the amount due on the Logsdon and Holcomb mortgages. This fact is important in view of the defense made by the bank in question and the wife of Chase. There was also a balance due on the Watts mortgage collected, of a few hundred dollars. The testimony tends to show that J. O. Chase was president of the bank from early in 1887 until the spring of 1888, and all of the above obligations were received by the bank while he was president thereof; that the bank stopped payment on the 10th of May, 1888, and had been insolvent for many months before that time; that on the 10th of August, 1888, or three months after the failure of the bank the mortgages in question were executed. A receiver was appointed for the bank, who was permitted to intervene in this action, and has answered in effect that the plaintiff was a general depositor and creditor of the bank and is not entitled to preference, and that he should be required to share *pro rata* with other creditors. Mrs. Chase, the wife of J. O. Chase, answers that the debt secured by mortgage is that of the bank and not of J. O. Chase. The lot above described is her individual property; that the other lots named, as a homestead, are now occupied by her as such. She also pleads a want of consideration, and that the mortgage was obtained by duress. On the trial of the cause the court found as follows:

"The court also finds that there is due to the plaintiff upon the notes set forth in said petition, which said mortgage was given to secure, the sum of \$2,940, and that the plaintiff is entitled to a foreclosure of said mortgage as prayed only on the following of said lots, that is to say, on lots 767, which was the individual lot of the defendant Hattie E. Chase, and upon lots 766 and 765, which were the homestead property of the defendants J. O. Chase and Hattie E. Chase. The court finds that as to said lots the said mortgage gave a lien to the plaintiff for the amount

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of said mortgage thereupon, and that the execution of said mortgage did not confer or pass any right or title to said lots, or any thereof, to the defendant Edward E. Balch, the receiver of the First National Bank of Fairmont; the court further finds that the making of said mortgages, as to the remainder of said lots, that is to say, as to lots 748 to 753 inclusive, and 764 to 762 inclusive, operate as a transfer of all of said lots, to-wit, lots 764, 763, 762, 748, 749, 750, 751, 752, and 753 to and for the use and benefit of the creditors of the First National Bank of Fairmont, and that as the receiver of the First National Bank of Fairmont the defendant Edward E. Balch is entitled to the same, and all thereof, for the use and benefit of the creditors of the First National Bank of Fairmont."

The defendants appeal. In the defendants' briefs the matter is discussed as though the plaintiff was a general depositor of the bank and hence the mortgages in question inure to the benefit of the bank. This contention is not sustained by the proof. The letter of the plaintiff of March 6, 1888, in regard to the Logsdon and Holcomb mortgages is as follows:

"WEST TROY, N. Y., Mar. 6, 1888.

"To Cashier First National Bank, Fairmont, Neb.

Inclosed I hand you for collection and remittance notes and mortgages of Samuel Logsdon and wife..... \$425 00
Int. due Feb. 17, '88..... 34 00

\$459 00

John Holcomb and wife.....\$1,000 00
Int. to Mar. 10, 1888..... 80 00

\$1080 00

"A. Logsdon's money was on deposit at maturity of papers, his int. shd. recl. to that date. In all these cases please carry out faithfully the provisions of the papers. I do not know what to calculate in regard to some of these

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fellows. I am told to send out papers and when they get there they are neglected.

"Yours,

W. GRIFFIN.

"Please acknowledge receipt.

W. GRIFFIN."

The testimony of Samuel Logsdon as to whom and when he paid the mortgages is as follows:

Q. Did you give a note and mortgage to William Griffin at one time?

A. Yes, sir.

Q. Did you ever pay that note and mortgage?

A. Yes, sir.

Q. How much was it?

A. Four hundred and twenty-five dollars principal.

Q. How much interest?

A. Thirty-four dollars, I think.

Q. When did you pay it?

A. About one month after it was due, I think about the 20th of March; it was due the 17th of February.

Q. To whom did you pay it?

A. J. O. Chase.

Q. How did you pay it?

A. I paid it in money.

Q. Did you pay anything besides the principal and interest?

A. I paid the exchange.

Q. What exchange?

A. It was the same as money; I placed coupon notes—the exchange was fifteen cents and then he charged me extra; I paid him the fifteen cents for the coupon and the rest I cannot tell you how much.

Q. State when you paid the money to Mr. Chase whether he said anything in regard to your paying exchange.

A. Yes, sir; he did.

Q. What was it?

A. I cannot tell you just what he said; I just paid him

fifteen cents and he charged me extra of course; I cannot tell you what he said.

Q. What, if anything, did he say about what he got out of it?

A. He said he just got his per cent for collecting, that was all he got out of it, and he never offered to do business for nothing, or something like that; I cannot exactly give you the words.

Similar testimony was given in regard to the payment of the Holcomb mortgage and interest. We think that the proof establishes the fact that the bank received the money in question of the plaintiff, as his agent, with directions to remit to him. The money was not to be deposited in the bank but sent at once. This simplifies the case very much. It is very clear that the bank was the agent of the plaintiff and that the relation of principal and agent existed between them. The bank therefore held the funds of the plaintiff as trust funds and they were never mingled with the funds of the bank with the plaintiff's consent.

In *Peak v. Ellicott*, 30 Kan., 156, where a party had paid to the cashier of a bank the amount of a note given by him to the bank, which the cashier claimed had been rediscounted in another town, but would be sent for and canceled, the bank soon afterwards failed without canceling the note. The court held that the money so received was a trust fund, which must be applied to the purposes indicated and that it did not become a part of the assets of the bank. To the same effect *Ellicott v. Barnes*, 31 Kan., 170.

In *McCleod v. Evans*, 66 Wis., 401, 28 N. W. Rep., 173, it was held that a banker who accepts for collection a draft, and in fact collects the money thereon, holds the same as trustee of the owner; and after his assignment for the benefit of creditors, the trust character still adheres to the funds in the hands of the assignee, irrespective of other creditors. (*Francis v. Evans*, 33 N. W. Rep. [Wis.], 93; *Anheuser-Busch Brewing Ass'n v. Morris*, 36 Neb., 31.)

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Other cases to the same effect can readily be cited, but it is unnecessary. That these moneys were held in trust there is no doubt, and as such they did not belong to the bank or become a part of its assets. The receiver, therefore, has no interest in such moneys.

2. It clearly appears that J. O. Chase personally received about \$1,600 of the money in question. There is no proof that he turned it over to the bank. He recognized his personal liability for the money by executing with his wife the mortgages in question. They were given, therefore, so far as the proof shows, to secure the debt of Chase and not of the bank. The objection of want of consideration therefore fails.

3. It is possible as between the wife as surety for her husband and creditors of the bank that her personal estate and homestead are liable only after the lots owned by J. O. Chase are sold. This phase of the case is not very clearly presented in either brief, and we will hear further argument upon it. Except as herein modified, the judgment of the court below is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

A. REUBER V. GEORGE E. CRAWFORD.

FILED MARCH 1, 1893. No. 4470.

1. **Alteration of Promissory Note: WEIGHT OF EVIDENCE.** In an action upon a promissory note one of the defenses was that the note had been altered by the insertion of the figures "10," to indicate the rate of interest. *Held*, That a preponderance of the evidence failed to show such alteration, and that if the defendant's testimony was true the note would draw seven per cent.

2. ———: ———: BONA FIDE HOLDER. A party, on entering into a contract with an alleged fence company to act as its agent within a certain township for one year, gave his negotiable note for \$120 with ten per cent interest, for the prospective profits to the company, the note to be returned at the expiration of the year, less the profits on the fence sold, if sufficient profits were not received to satisfy the note in full. The note was duly indorsed and transferred a few days after it was made. In an action by the holder against the maker, *held*, that a preponderance of the proof showed that he was a *bona fide* holder and entitled to recover.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

Thummel & Platt, for plaintiff in error.

Thompson Bros., *contra*.

MAXWELL, CH. J.

This is an action upon a promissory note as follows:

“\$120. GRAND ISLAND, NEBRASKA, August 4, 1887.

“One year after date I promise to pay to the order of Cole, Grant & Co. one hundred and twenty dollars, value received, with interest at 10 per cent per annum, payable at Hall County Fence Factory.

“G. E. CRAWFORD.”

The defendant in his answer specifically denies many of the facts stated in the petition.

“2d. Admits the execution of the note, but alleges that it has been altered by inserting the figures ‘10’ in that part of the note fixing the rate of interest, whereas in the note as he signed it there was a blank space left for the rate of interest.

“3d. That the instrument set forth in said plaintiff’s petition as originally executed and as described in the second count of this answer was procured from this defendant by the said Cole, Grant & Co., and their agents, by fraud and misrepresentations in this, that they (the said Cole, Grant

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& Co.) had established a manufactory in the city of Grand Island, Nebraska, in said county for the purpose of and was then manufacturing combination slat and wire fence under letters patent No. 298,032, dated May 6, 1884, and that they were, could, and would manufacture under said patent at said place fence of the following prices and so sell and turn the same over to this defendant if he would become their agent in said county, to-wit: 35-40c. per rod for 2 foot or hog fence, 55c. per rod for 6 wire fence, 60c. per rod for 8 wire fence, and 65c. per rod for 10 wire fence, all fence to be composed of No. 12 annealed steel and galvanized wire, and pickets 46 per rod. And that said fence would be a good and substantial fence, to be as good if not better fence than those then being manufactured and sold by James Cannon under the same patent in said county, and that the same could be manufactured and sold by them or others for said prices in said city, the same being the reasonable price therefor; that all of said representations of the said company and their said agent so made were false and untrue, as the said company and their said agent then well knew, and were made for the purpose of inducing the said defendant to become the agent for the said company for the sale of the said fence, and to induce him to give the said note or contract, and that relying upon the said false and fraudulent representations the said defendant executed the said note as it was before the said alteration was made, and delivered the said instrument to the said Cole, Grant & Co. through their said agents or servants, and that said instrument is therefore void, and that there was no other or further or different consideration for the giving of the said note or contract than as hereinbefore stated, and that the same was done without any consideration, and is therefore void, and that the said A. Reuber, and each and every one of the said parties mentioned in the said plaintiff's petition as being the holders and owners of the said note, had full and complete notice and knowledge

of the foregoing at the time and before they or either of them come into possession of said note, and that this defendant denies that either of said persons are innocent purchasers of said note for value before due, or at any other time, in the manner mentioned in said plaintiff's petition, or in any other way. Wherefore the said defendant asks that said note be declared void and of no effect, and that the same be ordered canceled, and for costs of suit."

On the trial of the cause the jury returned a verdict in favor of the defendant, and the action was dismissed. The original note is before us. It bears on its face evidence that it was filled out in full at the time it was made, and the person who filled the same out swears positively that such was the case. The only proof that it was not so filled out is the testimony to that effect of the defendant, but it is evident that he is mistaken, and a preponderance of the evidence is the other way. The agreement may have been as he contends, but it was filled out to draw ten per cent; and even if in the form the defendant contends for it would draw the legal rate, viz., seven per cent.

2. In August, 1887, the plaintiff and defendant entered into the following agreement:

"ARTICLE OF AGREEMENT

Made and entered into this 4th day of August, 1887, by and between Cole, Grant & Co., of Bloomington, state of Illinois, parties of the first part, and G. E. Crawford, of the county of Hall, state of Nebraska, party of the second part, witnesseth: That the said parties of the first part, as legal owners of letters patent Nos. 298,032, dated May 6, and 300,517, dated July 7, 1884, upon improved machines to manufacture the combination slat and wire fence, and desiring to establish a permanent industry in Hall county for the purpose of manufacturing and selling said fence, do hereby make and constitute the party of the sec-

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ond part a lawful agent, with power to contract, build, or sell the manufactured fence in the township of Wood River, county of Hall, state of Nebraska.

"The manufactured fence to be kept in stock by the manufacturing agent, Merrill & Matheson, at Grand Island, county of Hall, state of Nebraska, and at all times to be furnished to the second party at wholesale prices: 35-40c. per rod for 2 foot or hog fence, 55c. per rod for 6 wire fence, 60c. per rod for 8 wire fence, and 65c. per rod for ten wire fence. All the fence to be composed of No. 12 annealed steel and galvanized wire, with 46 pickets per rod. The manufacturing agent has also bound himself by contract to use his endeavors to sell the fence, and on all sales made by him or at the factory to credit the township agent wherein the fence goes with all in excess of wholesale prices, the same to be sold so that the net profits to the agent shall at all times be 15c. per rod, or \$48 per mile.

"The party of the second part, for and in consideration of the rights and privileges granted, does hereby agree to use his endeavors to sell the fence in the above named territory, keep a true account of the same, and remit by draft or postal order to the first parties 5c. per rod of the commission, after he has received all of the commission amounting to \$360.00 on the first $7\frac{1}{2}$ miles that are sold, as he has this day paid \$120 to the first parties by the execution of his obligation, the commission on $2\frac{1}{2}$ miles of fence, the said $2\frac{1}{2}$ miles of fence to be sold in one year from the above date, as said obligation is given in consideration of the township, $\frac{3}{8}$ interest in the business and privileges herein granted, and if said $2\frac{1}{2}$ miles of fence are not sold at the expiration of one year, and said \$120 not obtained by the extended date of one year from maturity of said obligation, said Cole, Grant & Co., or their authorized representatives, are unconditionally empowered to cancel said obligation of said agent and appoint another agent in his stead, returning to said agent the original ob-

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ligation of \$120, but not the amount of commissions paid thereon.

"The second party has also the right to use on all his own lands the fencing at factory prices, and the exclusive management of the business in his territory, and is to report amount of business by letter to the first parties at his general office in Bloomington, Ill., quarterly, on or before January, April, July, and October.

"In witness whereof, we have hereunto set our hands the day and year above written.

"COLE, GRANT & CO.

"G. E. CRAWFORD.

"NOTE.—Two of the above contracts are to be filled out exactly alike, and both of the contracting parties sign them, so each will hold a copy."

This is a very plausible agreement, with many advantages in favor of the alleged agent. It may have been fraudulent, although there is but little proof on that point. The defendant, however, in anticipation of profits to be derived from the sale of the fencing set forth in the contract, gave the note in question. This is negotiable, and he must have known that it was liable to be transferred to a *bona fide* holder. The note is, in effect, admitted to be genuine, and the plaintiff claims to be an innocent purchaser before maturity and without notice, and has introduced proof to sustain his contention. This proof preponderates over that of the defendant. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN D. GARMIRE V. JOHN A. WILLY.

FILED MARCH 1, 1893. No. 4529.

36	340
57	733
36	340
59	730

1. **County Court: JURISDICTION: PARTY WALLS.** A county court has jurisdiction of an action brought upon a party wall agreement to recover one-half the expense of building a party wall, where the amount sought to be recovered does not exceed the jurisdictional limit of such court.
2. **Party Wall Agreement: COST OF CONSTRUCTION OF WALL: LIABILITY OF PURCHASER OF ADJOINING LOT.** Where a party purchases a lot on which there is a party wall built by the owner of the adjoining lot, with notice, either actual or constructive, of a contract between his grantor and such adjoining lot owner, that the grantor will pay one-half the costs of constructing the wall whenever he shall use it, the agreement further stipulating that the covenants therein shall extend to and be binding upon each party, his heirs, administrators, and assigns, such purchaser is liable for the amount agreed to be paid by his grantor in case he makes use of the wall.
3. ———: **REGISTRATION: NOTICE.** The proper registration of a party wall agreement is constructive notice to all purchasers of the real estate affected by the agreement, and such notice is as effectual and binding as actual notice.
4. **Bona Fide Purchasers.** Where a purchaser of property pays the grantor the consideration therefor after he has received actual or constructive notice of a prior right or equity, he is not entitled to the protection which the law affords an innocent purchaser for value.
5. **Evidence: REVIEW.** *Held*, That the proof supports the verdict.

ERROR from the district court of Thayer county. Tried below before MORRIS, J.

O. H. Scott and Hambel & Heasty, for plaintiff in error.

Manford Savage, M. H. Weiss, and C. L. Richards,
contra.

NORVAL, J.

This was an action brought in the county court by John A. Willy against John D. Garmire, to recover one-half of the cost of a party wall constructed by Willy, under a written contract with one E. M. Correll, defendant's grantor, and for damages alleged to have been sustained by reason of the defendant carelessly and negligently cutting into and injuring said party wall and plaintiff's building. From a judgment in favor of the plaintiff in the county court the defendant appealed to the district court, where the cause was tried to a jury who, under the instructions of the court, found for the plaintiff, assessing his damages at the sum of \$332.83, being one-half of the value and cost of the party wall.

In June, 1886, John A. Willy and E. M. Correll entered into a written contract, by the terms of which the former was authorized to construct a party wall upon the dividing line between their adjacent lots, in the town of Hebron, one-half of the wall to rest upon Correll's lot, and the other half on Willy's lot. It was expressly stipulated in the contract that when so built, Correll, upon the payment of one-half of the costs of the erection of said wall, should have the right to use the same as a party wall for any building he might thereafter construct on his lot. The contract also contained this provision: "It is mutually agreed that all the covenants and agreements herein contained shall extend to, and be obligatory upon, the heirs, administrators, and assigns of the respective parties." The agreement, though signed by the parties in June, 1886, was not acknowledged by them, so as to authorize it to be recorded, until September 21, 1888. It was duly filed for record on the day last above written, at 9:20 A. M.

Subsequent to the making of said contract, but prior to September, 1888, Willy erected a brick building, with a stone foundation thereunder, upon his lot, and in so doing

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constructed a party wall in accordance with said agreement, resting one half thereof upon his lot and the other half upon the one owned by Correll. After the party wall was erected, Correll sold and conveyed his lot to John D. Garmire, who erected a building thereon, and made use of the party wall as one of the walls for his building. Neither Correll nor Garmire having paid any portion of the cost of the party wall, this action was brought.

The first objection urged against the judgment is that the county court had no jurisdiction of the subject-matter, hence the district court acquired none by the appeal. The case of *Brondberg v. Babbott*, 14 Neb., 517, is cited to sustain the proposition. In that case it was held that the district court acquires no jurisdiction of a cause on appeal from the county court if the latter had no jurisdiction of the subject-matter. We concede the soundness of the doctrine therein announced, but it has no application to the case at bar, unless the proposition contended for by the defendant be true, namely, that the court had no jurisdiction to try and determine the case. Whether it had jurisdiction of the second and third causes of action alleged in the petition, which relate to damages to the party wall and plaintiff's building, it is not necessary to stop to inquire, inasmuch as no recovery was had upon either of these counts of the petition. The only question submitted to the jury to pass upon had reference to the value or cost of one-half of the party wall.

Has a county court jurisdiction in an action brought upon a party wall agreement to recover a portion of the cost of building a party wall? The answer must be in the affirmative.

By section 16 of article VI of the state constitution it is provided that "county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction

as may be given by general law. But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered or may be drawn in question; nor in actions on mortgages, or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed shall exceed one thousand dollars."

Section 2 of chapter 20, Compiled Statutes of 1891, declares that "county judges, in their respective counties, shall have and exercise the ordinary powers and jurisdiction of a justice of the peace, and shall, in civil cases, have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars, exclusive of costs; * * * *Provided*, That county courts shall not have jurisdiction: I. In any action for malicious prosecution. II. In any action against officers for misconduct in office, except where like proceedings can be had before justices of the peace. III. In actions for slander and libel. IV. In actions upon contracts for the sale of real estate. V. In any matter wherein the title or boundaries of land may be in dispute, nor to order or decree the sale or partition of real estate."

It is perfectly plain from a reading of the foregoing constitutional and statutory provisions that the county court had jurisdiction of the subject-matter of the action. The case does not come within any of the limitations upon the powers of such courts contained in the sections quoted. This is a plain action upon a contract for the recovery of money only.

In *Mushrush v. Devereaux*, 20 Neb., 49, it was held that a county court has jurisdiction in an action for money had and received, brought to recover money paid upon an agreement for the purchase and sale of land, where the defendant refused to perform his agreement to convey. To us it seems to follow logically from the principle of that decision

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that the county court had jurisdiction of the subject-matter contained in the first count or cause of action in the petition filed in this case.

It is also contended by the defendant that there was neither privity of contract nor estate between the parties to the action, hence, if the agreement can be enforced against the defendant, it must be by equitable action and not by a suit at law. It is, doubtless, true the agreement created an equitable easement or charge upon the lot sold by Correll for the amount of the one-half of the cost of the construction of the party wall, which could have been enforced by appropriate equitable action. (See *Stehr v. Raben*, 33 Neb., 437.) But it does not follow from this that an action at law will not lie against Garmire, personally, to enforce the agreement. It must be conceded had Correll used the party wall before the sale of his lot, he would have been liable, under the agreement, for his portion or share of the cost of its erection. Garmire, having purchased the lot with notice of the agreement, occupies no better position with respect to the agreement than his grantor. By claiming the benefits of its provisions he became bound for the performance of the stipulation to pay one-half the cost of constructing the wall. Such an agreement attaches to the land. (*Burr v. Lamaster*, 30 Neb., 688; *Jordan v. Kraft*, 33 Id., 844; *Roche v. Ullman*, 104 Ill., 11.)

It is finally claimed that the court erred in directing the jury to find for the plaintiff, and this assignment is based upon the fact that the court did not submit to the jury the question whether or not the defendant knew of the party wall agreement at the time of the purchase of the lot. The evidence is conflicting upon the point whether the defendant had actual notice of the agreement before he made the purchase. He testified that he had no notice whatever, while plaintiff and Mr. Correll both testified positively that he had. If the case rested solely upon whether Gar-

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mire had actual notice at the time of the purchase and sale, we would agree with defendant's counsel, that owing to the conflicting evidence the question should have been left to the jury.

But the record shows that the defendant had constructive notice of the terms of the party wall agreement, at least before the consideration for the lot was paid, which is as binding upon him as if he had received actual notice thereof. An optional contract for the purchase of the lot was made on September 20, 1888, which was the day prior to the recording of the party wall agreement. The price of the lot was fixed at \$1,000. The agreement was that Correll should make a deed for the lot and deposit the same with the First National Bank of Hebron, to be delivered to Garmire on the payment of the full consideration, which was done. The latter was to and did draw his check on said bank for the sum of \$100, payable to the order of Correll, which was likewise left with the bank. The following stipulation was written upon the back of the check:

"SEP. 20, '88.

"This check is given to bind the bargain for the sale of E. M. Correll's business lot on Lincoln Ave. for one thousand dollars, payable within sixty days from date. Lot located in block 15, town of Hebron. The option is good for 10 days and this check is returnable to maker within that time at his request. E. M. CORRELL."

It is uncontradicted that the money was not paid to Mr. Correll upon the check until thirty days after its date, and the remaining \$900 of the purchase money was not paid until about thirty days later, when the deed was delivered and placed on record. In view of the facts appearing in this record we are forced to the conclusion that defendant was not an innocent purchaser. In order to constitute a grantee a *bona fide* purchaser he must have parted with the consideration before he receives notice of any prior

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right or equity. At the time the defendant paid the purchase money he had constructive notice of the existence and terms of the party wall agreement entered into between his grantor and the plaintiff, since the agreement was then duly recorded. The judgment of the district court is

AFFIRMED.

THE other judges concur.

36	846
37	813
36	846
39	839
36	846
48	895
36	846
52	61
54	220
36	846
62	230

WILLIAM T. GILES, APPELLANT, v. J. THEO. MILLER,
APPELLEE.

FILED MARCH 1, 1893. No. 4525.

1. **HOMESTEAD: JOINT-TENANTS.** A homestead may be claimed in lands held in joint-tenancy.
2. ———: ———: **OCCUPANCY.** An undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest and his family as a home, is sufficient to support a homestead exemption.
3. ———: **CLAIM OF EXEMPTION OF PERSONALTY: ESTOPPEL.** Upon the facts stated in the opinion it was held that neither the plaintiff nor his grantors are estopped to claim that the property in controversy was a homestead at the time of the conveyance.
4. ———: **VENDOR AND VENDEE: LIEN OF JUDGMENT BEFORE PURCHASE.** Under the homestead law of 1879, the purchaser of lands held and occupied at the time of the conveyance as the homestead of the grantor, and which does not exceed in value the sum of \$2,000, takes the same free from the lien of a judgment docketed prior to such purchase, but during the existence of the homestead right.

APPEAL from the district court of Phelps county.
Heard below before GASLIN, J.

Rhea & Rhea, for appellant.

G. Norberg and Walter A. Leese, contra.

NORVAL, J.

This was an action brought by William T. Giles, plaintiff and appellant, to quiet the title to lots 3, 4, 5, and 6, in the northeast quarter of section 19, in township 7 north, of range 17 west, in Phelps county, and to enjoin the sale of said premises upon an execution issued on a judgment in favor of appellee and against one J. A. Giles. On the trial the district court found the issues for the defendant, and dismissed the action.

The record before us shows that on and for several years prior to the 4th day of March, 1889, plaintiff and said J. A. Giles were the owners of the real estate above described, each being the owner in fee of the undivided one-half interest therein; that said J. A. Giles during said time was a married man and resided upon said premises and occupied the same with his family as a homestead and farmed the same; that on the said 4th day of March, 1889, said J. A. Giles, his wife, Anna L., joining with him, by deed of general warranty, conveyed his interest in said land to the plaintiff herein, which deed was duly recorded the following day.

On the 15th day of October, 1888, the defendant and appellee, J. Theo. Miller, recovered a judgment against said J. A. Giles, before a justice of the peace of Phelps county, for \$120.50 and costs. A certified transcript of said judgment was filed in the office of the clerk of the district court of said county, on October 18, 1888. Subsequently, on October 25, 1889, Miller caused an execution to be issued by the clerk of said court upon said transcript, and to be delivered to the sheriff of said county, who levied the same on said land, and the sheriff being about to sell the same, this suit was instituted. The proofs estab-

lish that the premises in controversy were, at all times herein stated, of less value than \$2,000.

The plaintiff below contends that the filing of the transcript of said justice's judgment in the district court did not create a lien upon the lands in dispute, and that said real estate is not subject to sale upon execution issued upon said transcribed judgment, for the reason that said premises constituted the homestead of plaintiff's grantors, J. A. Giles and wife, at the time of the filing of such transcript, and from thence until the conveyance was made to plaintiff. The defendant Miller insists that a person cannot claim a homestead in lands which he owns in common with another, and inasmuch as J. A. Giles only owned an undivided interest in the property, such interest is subject to the lien of defendant's judgment against him, and may be sold on execution under it.

The precise question presented has never been passed upon by this court. That a homestead can be claimed by a tenant in common is affirmed by the courts of some of the states, while the contrary doctrine is held in other states.

Section 1 of the legislative enactment of 1879, entitled "An act to provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment levy, or sale, upon execution or other process," provides: "A homestead not exceeding in value \$2,000, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land, not exceeding two lots, within any incorporated city or village, shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

Neither the above provision, nor any other section of the

homestead law, specifies or defines the character of the ownership or interest in lands which is necessary to support the homestead right. We know that the purpose of the legislature in enacting the statute under consideration was to protect the debtor and his family in a home from a forced sale on execution or attachment. Keeping this object in view, and applying the liberal rule of construction which always obtains in the interpretation of exemption laws, we are constrained to hold that any estate or interest in lands which give the right of occupancy or possession is sufficient, if coupled with requisite occupancy, to entitle the person to the benefits of the provisions of the section above quoted. The ownership need not be of an estate in fee-simple, but the owner of the equitable title occupying under a contract of purchase may claim the exemption of the statute. So, we think, an undivided interest in real estate, accompanied by exclusive occupancy, will support the homestead claim. J. A. Giles, as the owner of an undivided interest in the property, was entitled to the exclusive possession as against every person but his co-tenant. The quantity and value of the land being within the statutory limit, and the requisite occupancy being established, we conclude that the judgment was not a lien upon the grantors' interest in the land. (*Lozo v. Sutherland*, 38 Mich., 168; *Sherrid v. Southwick*, 43 Id., 515; *Cleaver v. Bigelow*, 61 Id., 47; *Herdman v. Cooper*, 29 Ill. App., 589; *Feldes v. Duncan*, 30 Id., 469; *Conklin v. Foster*, 57 Ill., 104; *Potts v. Davenport*, 79 Id., 455; *Tarrant v. Swain*, 15 Kan., 146; *Thorn v. Thorn*, 14 Ia., 49; *Horn v. Tufts*, 39 N. H., 478; *McClary v. Bixby*, 36 Vt., 257; *Oswald v. McCauley*, 42 N. W. Rep. [Dak.], 769; *Kaser v. Haas*, 7 N. W. Rep. [Minn.], 824; *Freeman*, Co-Tenancy and Partition, sec. 54.)

Counsel for defendant insist that J. A. Giles waived his homestead rights in the property, by reason of his having claimed certain personal property as exempt from sale

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under an execution issued against him on the said judgment in favor of said Miller. It appears that prior to the issuance of the execution, under which the real estate in question was about to be sold, and before the same was conveyed to this plaintiff, another execution was issued upon the same judgment, which was leveled upon certain personal property owned by J. A. Giles. For the purpose of claiming his exemptions the said judgment debtor presented to the officer holding the execution, and filed with the justice before whom the judgment was rendered, a schedule or inventory of the whole of his personal property, in which he stated under oath that "I am the head of a family, and have neither lands, town lots, nor houses subject to execution as a homestead under the laws of this state, and that the above inventory and appraisement contains a true list of the whole of the personal property owned by me."

The property was not released from the levy, but the same was sold, under the writ, to one Phare, who at the time knew that the property was claimed as exempt. Subsequently J. A. Giles replevied the property from the purchaser, alleging in the affidavit therefor that the property was exempt. Giles was successful in the action. It is now claimed that he and those claiming under him are estopped to insist that the real estate was the homestead of J. A. Giles. No estoppel was either pleaded or proved in this case against the wife. So far as appears she had nothing to do with the filing of the inventory. It is not even shown that she knew its contents or that it had been filed, or that her husband claimed the personal property as exempt in lieu of a homestead. The homestead law was passed for the protection of the family of the debtor, and either husband or wife may claim the benefits of its provisions. The statute, in effect, provides, and it has been frequently held, that the homestead cannot be aliened or incumbered without the joint consent of both husband and wife. The husband alone cannot deed or mortgage it, so as to deprive either

himself or the wife of their interest in the homestead. So we conclude that Mrs. Giles was not concluded by the acts and conduct of her husband from claiming the property as a homestead.

The case falls within the principle of the decision in *Whitlock v. Gosson*, 35 Neb., 829. In that case one William Gosson, with his three children, moved to this state from Illinois and resided upon and occupied a tract of land in Madison county as a homestead. At the time of his removal to this state, and ever since, he had an insane wife who was and is an inmate of an asylum for the insane in the state of Illinois, and has never resided in this state. Gosson executed a mortgage on the homestead, in which he was described as a single man, and the credit was extended on the faith of that statement. It was held that the mortgagor was not thereby estopped to claim the mortgaged premises as a homestead and that the mortgage was void as to the homestead right. Judge POST in delivering the opinion of the court upon that question says: "Estoppel will not supply the want of power or make valid an act prohibited by express provisions of law. The statute, in effect, declares a conveyance or incumbrance of the family homestead by the husband alone void, not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead rights as against the grantee or mortgagee. Such is the view sanctioned by the clear weight of authority, and supported by the soundest reasoning." (See *State, ex rel. Stevens, v. Carson*, 27 Neb., 501.)

As the real estate in dispute was the homestead of J. A. Giles at the time of the filing of the transcript of the judgment and at the time of plaintiff's purchase, defendant's judgment was not a lien on the property. The purchaser of land which is held and occupied by the owner and his family as a homestead, and which does not exceed in value \$2,000, takes the same free from the lien of a

Richards v. McMillin.

judgment docketed prior to such purchase, but during the existence of the homestead right. In other words, a judgment is not a lien upon homestead premises, and the owner can convey the same free from his previous judgment debts. (*Schribar v. Platt*, 19 Neb., 625.) It follows that the plaintiff is entitled to a judgment as prayed for in his petition, and the district court erred in dismissing the action. The judgment appealed from is reversed, and a decree will be entered in this court for the plaintiff in conformity to this opinion.

DECREE ACCORDINGLY.

THE other judges concur.

36	352
145	787
36	352
52	219
36	352
58	295
36	352
80	816

DE FOREST RICHARDS V. HIRAM G. McMILLIN.

FILED MARCH 1, 1893. No. 4701.

1. **County Officers: INELIGIBILITY: AUTHORITY OF COUNTY BOARD TO DECLARE VACANCIES AND MAKE APPOINTMENTS: HOLD-OVER OFFICERS.** A county board is not authorized to declare vacant a county office and make an appointment to fill such vacancy on the sole ground that an officer elect is ineligible and therefore unable to qualify. The incumbent of such office has a right to qualify within ten days after it is ascertained that his successor elect is ineligible, and upon qualifying in the manner provided by law will be entitled to hold over until a successor is elected and qualified.
2. ———: **ACTION TO RECOVER EMOLUMENTS FROM DE FACTO OFFICER.** Where a claimant of an office sues a *de facto* officer to recover the emoluments thereof received by the latter, the plaintiff's title to the office is put in issue, and in order to recover he is required to prove that he is the *de jure* officer.
3. ———: ———: **HOLD-OVER OFFICER: SUFFICIENCY OF EVIDENCE.** Evidence examined, and held not sufficient to sustain a finding that the defendant in error qualified as treasurer of D. county in the manner and within the time prescribed by law, so as to en-

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title him to hold over as his own successor, the treasurer elect having been adjudged ineligible.

4. ———: ———: ELIGIBILITY OF DE FACTO OFFICER: RES ADJUDICATA. *Held*, That the judgment in *State, ex rel. Richards, v. McMillen*, 23 Neb., 385, is conclusive of the question of the eligibility of the relator therein to the office of treasurer of Dawes county by election at the general election in 1885, but not of his eligibility to said office by appointment in the month of January, 1886.

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

Albert W. Crites, for plaintiff in error.

Alfred Bartow, contra.

POST, J.

This is a petition in error from the district court of Dawes county, the following being the material facts disclosed by the record: At the general election in 1885 the plaintiff in error was elected treasurer of said county. Before the commencement of his term of office the defendant in error, who was then treasurer of said county, commenced contest proceedings in the county court against him on the ground that he was ineligible to the said office by reason of not having resided in the state for six months previous to said election. On the 8th day of December, 1885, final judgment was entered by the county court in said proceeding, finding that the contestee therein, plaintiff in error, was ineligible, and declaring his said election null and void. From the judgment aforesaid an appeal was taken to the district court, but said appeal was subsequently dismissed on the motion of the appellant therein, leaving the judgment of the county court in full force and effect. On the 9th day of January, 1886, the county board of said county, at a meeting legally called, among other things, made the following record: "On motion the office of county

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treasurer was declared vacant. It was moved by D. W. Sperling that De Forest Richards be appointed county treasurer;" and on the same day Mr. Richards filed his official bond, in which it is recited that he has been appointed treasurer of Dawes county, which was approved by the county board, and after having taken the oath of office he assumed the duties of said office, and which he continued to discharge until the end of the term, on the 5th day of January, 1888. The county board continued to recognize him as the treasurer of said county by delivering to him the tax lists for the years 1886 and 1887, and otherwise. The defendant in error, who claimed the right to hold over as treasurer of said county by reason of the ineligibility of the plaintiff in error in January, 1886, tendered a new and sufficient bond as treasurer, but which was rejected by the county board. On the 20th day of January, 1886, while the defendant in error still had possession of a part of the records and papers of said office, the plaintiff in error instituted a proceeding by *quo warranto* against him in this court for the purpose of testing his right and title to said office, which resulted in a final judgment against the relator therein. (See *State v. McMillen*, 23 Neb., 385.) After the plaintiff in error had surrendered the office to his successor elect, in 1888, this action was brought against him by the defendant in error to recover the emoluments thereof during his incumbency, and a trial had, resulting in a judgment for the plaintiff below in the sum of \$2,030.87, and costs, whereupon the case was removed to this court by petition in error.

In considering the questions involved the fact should not be overlooked that the claim of the defendant in error to the emoluments of the office is based upon his alleged right to hold over on account of ineligibility of the plaintiff in error, his successor elect, while the claim of the latter is based upon his alleged appointment by the county board in January, 1886, and not his election in November, 1885.

It is claimed that the county board had no authority to make the appointment in question. By section 103, chapter 26, Compiled Statutes, entitled "Elections," it is provided, "Vacancies shall be filled in the following manner: In the office of the reporter of the supreme court, by the supreme court. In all other state and judicial district offices, and in the membership of any board or commission created by the state, where no other method is specially provided, by the governor. In county and precinct offices, by the county board; and in the membership of such board, by the county clerk, treasurer, and judge. In township offices, by the town board, but where the offices of the town board are all vacant the clerk shall appoint, and if there be no town clerk, the county clerk shall appoint. In city and village offices, by the mayor and council, or board of trustees." And by section 104 it is provided that "Every officer elected or appointed for a fixed term shall hold office until his successor is elected, or appointed and qualified, unless the statute under which he is elected or appointed expressly declares the contrary." There is certainly a respectable line of authorities holding that in the absence of a special statutory provision to the contrary, the failure of an officer elect, from any cause, to qualify will not create a vacancy so as to authorize the filling of such office by appointment in those states where officers hold until their successors are elected and qualified, but that the incumbent continues not merely as a *de facto* officer, but as an officer *de jure*. (See *State v. Howe*, 25 O. St., 588; *People v. Tilton*, 37 Cal., 614; *State v. Harrison*, 113 Ind., 434.) By our statute defining vacancies, section 101, chapter 26, Compiled Statutes, it is not declared that the failure of an officer elect to qualify, or a judgment declaring an election void, shall cause a vacancy. The only provision bearing upon the subject is subdivision 6 of said section, which provides that a vacancy shall exist in case of "a failure to elect at the proper time, there being no in-

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cumbent to continue in office until his successor is elected and qualified, nor other provisions relating thereto." Our conclusion is that the county board was not authorized to declare the office in question vacant on the sole ground that the election was void on account of the ineligibility of the plaintiff in error, and that the defendant in error was authorized to hold over until the next general election, at least, on conditions to be hereafter noticed.

It is provided by section 17, chapter 10, Compiled Statutes, that "when the incumbent of an office is re-elected or reappointed he shall qualify by taking the oath and giving the bond as above directed, but when such officer has had public funds or property in his control his bond shall not be approved until he has produced and fully accounted for such funds and property, and when it is ascertained that the incumbent of an office holds over by reason of the non-election or non-appointment of a successor, or of the neglect or refusal of the successor to qualify, he shall qualify anew within ten days from the time at which his successor, if elected, should have qualified."

Construing the last clause of the above section with the provisions previously cited, we think the right of the defendant in error on the failure of his successor-elect to qualify by reason of his ineligibility was to hold over, or become his own successor upon giving a new bond and taking the oath of office precisely as if he had been elected to succeed himself. In other words, the statute contemplates that he should enter upon a new and different term upon complying with the statutory conditions, and not otherwise. Another proposition, which we regard as well settled by authority, is that the plaintiff below must recover upon the strength of his own title to the office, and not on account of any defect in that of his adversary. To state the same proposition differently, the fact that plaintiff in error may have been a *de facto* officer merely will not avail the

defendant in error in this action, unless the latter was the *de jure* officer. There is much confusion upon the subject of the right of a *de jure* officer to recover from a municipality which has made full payment to an officer *de facto*, but there is no exception to the rule that in order to recover the emoluments received by another while in possession of an office the plaintiff must prove a better title thereto than the incumbent. And for the reason just stated, the defendant in error must fail in this action, since it does not appear from the record that he was, during the time for which he claims, either the *de facto* or *de jure* treasurer of Dawes county. He certainly was not a *de facto* officer, for the reason that the county board installed the plaintiff in said office and delivered to him the tax lists for the two years in question. It is admitted that the latter collected all of the revenue received by the county during said years, and disbursed it in accordance with the orders of the county board. Nor can defendant in error upon the record be said to be an officer *de jure*. There is no evidence that he ever qualified as a hold-over officer by taking the oath of office as provided by law. It is true that according to an admission in the record he tendered a sufficient bond during the month of January, 1886, but there is no proof from which we can infer that it was within the time prescribed by statute. The question when he was required to requalify in view of the facts disclosed is not involved in this controversy, but that an incumbent must in such case qualify anew in order to be entitled to the rights of an officer *de jure* is settled by the case of *State, ex rel. Thayer v. Boyd*, 31 Neb., 682; *State, ex rel. James, v. Lynn*, Id., 770.

2. It is probable that the action of the board on January 9, 1886, declaring the office vacant and attempting to appoint the plaintiff in error treasurer, was without authority of law, for, as we have seen, the defendant in error had a right to qualify as his own successor within ten days after

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it was ascertained that the plaintiff in error was ineligible. But never having requalified as the law requires, he is in no position to now call in question the title of the plaintiff in error who was at least a *de facto* officer.

3. There is no doubt of the eligibility of the plaintiff in error at the time of his appointment in January, 1886. The fact that he was ineligible to election in November, 1885, by reason of not having been a resident of the state six months, would afford no legal objection to his appointment to the same office two months later, at which time there is no doubt of his eligibility.

4. The only remaining question is the effect of the judgment of this court in the *quo warranto* proceedings above referred to, 23 Neb., 385. It is earnestly contended by defendant in error that the judgment therein is conclusive of the question now at issue, and such apparently was the opinion of the district court. From an examination of the opinion in that case our conclusion is that the only question therein involved was whether the relator was entitled to the office in question by reason of his having been a resident of the state six months before the commencement of the term for which he was elected, to-wit, in January, 1886, or whether the election was void, for the reason that he had not resided in the state for six months at the time of his election. The only point stated in the syllabus in that case is the following: "The relator was elected to the office of county treasurer at the annual election held November 3, 1885. At that date he had been a resident of the state for five months only, but was otherwise eligible. At the commencement of the term his residence in the state had been continuous for seven months. *Held*, That being ineligible to such election at the date thereof, under a fair construction of sec. 1, art. VII, of the constitution, and sec. 64, ch. 26, Comp. Stats., such ineligibility was not removed, for the purpose of that election, by reason of 'six months' continuous residence previous to the

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commencement of the term." The question of the right of the defendant in error to the emoluments of the office while holding by virtue of the alleged appointment by the county board is certainly an open one, and which, as has been intimated, we are constrained to resolve in his favor. The judgment of the district court is reversed and the cause remanded for further proceedings therein.

REVERSED AND REMANDED.

THE other judges concur.

JOHN FLANNAGAN V. MARSHALL EDWARDS.

FILED MARCH 1, 1893. No. 4729.

Review: EVIDENCE in the record *held* sufficient to sustain the verdict and judgment of the district court.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

David Van Elten, for plaintiff in error.

George A. Magney, *contra*.

POST, J.

This is a petition in error from Douglas county. The cause of action stated in the petition below is for work and labor performed by the plaintiff for the defendant therein, at the agreed rate of \$50 per month from the 18th day of May, 1888, until the 20th day of January, following, and for five days' work at the agreed rate of \$100 per month. For answer the defendant below alleges that he employed the plaintiff at the rate of \$50 per month as overseer for

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his brick yard at Beaver Crossing, Seward county, but that said amount was to be paid out of the proceeds of the brick burned, and not otherwise; that the plaintiff managed the business of burning brick in said yard in so unskillful a manner that no brick were burned therein. He denies all the other allegations of the petition. The defendant below also filed a counter-claim, in which he claims judgment for the sum of \$911.75, on account of boarding and lodging, and money advanced, twenty-three cords of wood converted by the plaintiff below, the use of his team and wagon by the latter, and a milch cow, alleged to have been converted by him. The reply was a general denial. Trial and judgment for the plaintiff below for \$53.65. A motion for a new trial having been overruled, the case was removed to this court on the petition in error of the defendant below. The only question presented by the petition in error is one of fact. We have read over the evidence in the record, and our conclusion is that the case is clearly within the rule so often announced, that a judgment will not be reversed for want of evidence, unless the burden of proof is plainly and unmistakably opposed to it. Here it is possible a verdict for the plaintiff in error might have been sustained by an application of the same rule, but the controlling question was, which set of witnesses should be credited by the jury, and with their judgment we have no right to interfere. The issues indicate the evidence of the parties respectively, and to set it out at length or to include a summary thereof in this opinion would serve no useful purpose. The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

OMAHA SOUTHERN RAILWAY COMPANY V. ALLEN
BEESON.

FILED MARCH 1, 1893. No. 4744.

1. **Eminent Domain: CONDEMNATION PROCEEDINGS: SUBSTITUTION OF INDEMNITOR.** A railroad company which has appropriated private property for right of way purposes, on appeal to the district court from an award of damage is not entitled to have a third party substituted and made a party in its stead, on the ground that such person has agreed to indemnify it for money expended for right of way.
2. **Intervention.** To entitle a third party to intervene in an action he must have some interest in the subject of the controversy. A mere contingent liability to answer over to the defendant, without any privity with the plaintiff, is not sufficient.
3. **Jury: DISCRETION OF TRIAL COURT: REVIEW.** In superintending the impaneling of a jury some discretion is necessarily confided to the court, and the excusing of a juror *for cause* will not be held ground for reversal, unless there appears to have been an abuse of discretion.
4. **Eminent Domain: TRIAL OF APPEAL FROM AWARD OF DAMAGES: PHOTOGRAPH OF PREMISES: EVIDENCE.** Where on a trial an inspection of the premises in question is proper, but impracticable or impossible, a photographic view thereof is admissible.
5. ———: ———: **EVIDENCE.** On trial of a condemnation proceeding it was not error to admit evidence tending to prove that the property in question (a tract of twenty-one acres adjoining the city of Plattsmouth) was susceptible of subdivision into smaller lots, by reason of which it was more valuable, and that in consequence of the construction of the railroad track subdivision thereof was rendered impossible, whereby the value of the tract was greatly impaired.
6. ———: ———: ———: **ANNOYANCE FROM PASSING TRAINS.** In such case, proof of annoyance by smoke and ashes from passing trains is admissible where the railroad track is constructed near the dwelling of the property owner, not as an independent element of damage, but as evidence tending to prove the value of the property after the construction of the track.

36	361
39	838
36	361
42	237
36	361
44	20
36	361
46	290
36	361
49	26
52	73
36	361
56	812
36	361
58	92

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7. ———: ———: WITNESSES: VOLUNTEER EVIDENCE: EXCEPTIONS: REVIEW. Where a witness volunteers testimony not responsive to any question, and which is immaterial under the issues, the complaining party should object thereto or move to strike it out of the record. A new trial will not be allowed on account of such volunteer evidence when no objection is made to it at the time of the trial.
8. Vacancy of Highway: REVERSION: EMINENT DOMAIN. Where a public highway is vacated and abandoned as such by lawful authority, the land included therein reverts to the abutting proprietors and cannot be appropriated by a railroad company for right of way without making compensation to such proprietors.
9. Evidence examined, and *held*, to prove a mere expression of opinion of parties named in the record, and not an offer of compromise, and is therefore admissible under the issues.
10. Instructions set out examined, and *held*, not subject to criticism by the plaintiff in error.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

A. N. Sullivan and Byron Clark, for plaintiff in error

E. H. Wooley and Beeson & Root, *contra*.

POST, J.

This is a petition in error from Cass county, and brings up for review the judgment of the district court, assessing the damage of defendant in error by the appropriation of certain property belonging to him adjoining the city of Plattsmouth by plaintiff in error for right of way purposes in the summer of 1890. The first error alleged is the refusal of the court to substitute for the railroad company, the defendant below, certain citizens of Plattsmouth who had agreed to indemnify said company for all money expended for right of way through the property of defendant in error. There is no error in the ruling complained of. A sufficient answer to the argument of the plaintiff in error

is, that the proposed intervenors are apparently satisfied with the ruling of the district court, the only party complaining being the railroad company. But the ruling was right, for the reason that the parties named had no direct interest in the subject of the controversy. There was no privity between them and the defendant in error, whose property had been appropriated. Their interest was a mere contingent liability to answer to the railroad company in case judgment was recovered against it in the condemnation proceeding. It was not an agreement made with the company for the benefit of the defendant in error, upon which an action could be maintained by the latter. There is no power conferred upon the court to dismiss a defendant against whom a cause of action is alleged and substitute in his stead a stranger to the record on the sole ground that the latter has agreed to satisfy the judgment of the court.

2. The second assignment is the sustaining of the challenge for cause, by the defendant in error to Edward O'Neill, who was called as a juror. In our opinion the juror was competent and the challenge might properly have been overruled, but so far as the record discloses the jury selected was perfectly fair, and the ruling complained of was, at most, error without prejudice. In superintending the impaneling of the jury some discretion is necessarily confided to the trial court, and the excusing of a juror by it for cause will not be held ground for reversal, unless there appears to have been a clear abuse of discretion. (Thompson on Trials, 88, and authorities cited; *Richards v. State*, 36 Neb., 19.) There is a wide distinction between the retention of a juror shown to be incompetent by reason of prejudice, or the like, and the improper excusing of one on the same grounds. In the one case the law presumes prejudice to the complaining party, while in the other, in the absence of proof, the presumption is that the jurors selected possess all of the statutory qualifications; hence, the

action of the court, if erroneous, is not prejudicial to the rights of either party.

3. Objection is next made to the admission in evidence of a photograph of the premises taken before the construction of the road. There was no error in the admission of the evidence. The condition and value of the premises before the construction of the road were proper subjects for the jury to consider, and where an inspection of the premises is proper but impracticable or impossible, a photographic view of it is admissible. (Thompson on Trials, 869.)

4. Defendant in error was permitted to introduce evidence tending to prove that before the construction of the road, his property, about twenty-one acres, was susceptible of subdivision into smaller tracts or lots, which fact it was claimed rendered it more valuable, and that after the building of the road, subdivision thereof was impossible, by reason of which its value was greatly diminished. It is not disputed that the property in question adjoins the city of Plattsmouth and was suitable for subdivision into suburban lots facing upon a public street. If the railroad track was so constructed as to render subdivision impracticable and the value of the property thereby impaired, such fact amounts to a direct injury to the property, for which the owner may recover in a condemnation proceeding. (*Atchison & N. R. Co. v. Boerner*, 34 Neb., 240; *Atchison & N. R. Co. v. Forney*, 35 Id., 607, and cases cited.) The court therefore did not err in receiving the evidence over the objection of plaintiff in error.

5. It is next argued that the court erred in receiving proof of annoyance to defendant in error on account of smoke and ashes from the engines passing on the track near his residence. It is evident from the record that the evidence referred to was admitted for the purpose of showing the value of the property after the construction of the road, and for no other purpose. For that purpose it was

clearly admissible. If the house was rendered intrinsically less valuable by reason of dust and smoke from passing engines, that fact was admissible not as an independent element of damage, but to be taken into consideration in determining the value of the entire tract as it then was burdened by the right of way.

6. Defendant in error, while testifying in his own behalf, was asked about the necessity of moving his house, and when about to answer an objection was made, whereupon he said, "I will drop that, and state my house is not in sight of any other house," and proceeded to testify that it would in the future be less desirable as a residence, owing to its liability to be visited by tramps. It may be admitted that the testimony with reference to the probability of annoyance by tramps was inadmissible and prejudicial, but it was entirely voluntary, not purporting to be in response to any question and received without objection at the time, and the objection thereto made for the first time in this court will not be considered.

7. It appears from documents offered in evidence by plaintiff in error and rejected, that a part of the land appropriated, to-wit, sixty-seven hundredths of an acre, was within the boundaries described in defendant in error's title papers, but had until recently been a part of a public highway, and which had been vacated as such on the petition of the defendant in error. The court did not err in excluding the evidence. On the vacation of the highway the land included therein reverted to the abutting proprietors and could not be taken for right of way by the railroad company without making compensation therefor. It also appears from the transcript that the particular fraction in question is included in the property condemned on the application of the plaintiff in error and it is now estopped to deny the title of defendant in error. (*Omaha, N. & B. H. R. Co. v. Gerrard*, 17 Neb., 587.)

8. Objection is made to the cross-examination of Mr.

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Windham as a witness, who, after having testified to the value of the premises which included a vineyard of about an acre in extent was asked, "Suppose that vineyard is just an acre and that we sold the grapes not used by the family, for \$150 cash, would that affect the value of the property?" To which he answered: "That would increase the value of the property." The witness had been called by the defendant in error to prove the value of the property before the construction of the track and upon cross-examination it was disclosed that he had no knowledge of the vineyard when he was properly permitted to answer the above question. No objection was made on the ground that the proper foundation had not been laid, and we can see no reason for criticising the action of the court in overruling the objection.

9. Certain witnesses were called by the railroad company, who fixed the defendant in error's damage at much less than the sum allowed by the jury. From their cross-examination it appears that they were members of a committee representing parties who had contracted to procure the right of way as a donation to the railroad company. They were then asked if they did not visit the premises and, after having estimated his damage, assure defendant in error that he was reasonably entitled to \$1,000, a sum much greater than their estimate at the trial. The objection to the above question is that the admissions offered were in the nature of an offer of compromise. That contention is not justified by the record. The evidence tends to prove a mere expression of opinion by the witnesses and not an offer to compromise.

10. Exception was taken to each paragraph of the instructions given by the court, thirteen in all, but the ones to which prominence is given in the brief of plaintiff in error are the fourth, eighth, and ninth, which are as follows:

"Fourth Instruction.—In determining the amount to be

allowed the plaintiff for the 2.05 acres of land taken by the defendant you are to find from the evidence what was its fair market value at the time it was taken. By this is not meant what the strip of land taken for the right of way, by itself, would be worth in the market, but as a part of the piece of the land owned by the plaintiff, and of which it formed a part, what would be the fair market value per acre for such land and allow the plaintiff at such rate for the 2.05 acres."

"Eighth Instruction.—You are instructed that you should not take as a separate and distinct basis for the assessment of damages such remote contingencies as frightening of horses, liability of fires, and danger to persons or property from passing trains, such contingencies are only to be considered for the purpose of determining whether and to what extent the value of the property will be decreased by the building and operation of the railroad. If, in consequence of its exposure to such dangers, the actual value of the property will be diminished to any extent, then such decrease in value measures the actual loss to the owner in so far as the damages done to his land not taken by the railroad is concerned."

"Ninth Instruction.—You are instructed that the evidence establishes the fact that the plaintiff is the owner of a piece of land of about twenty-one acres in a body, and in considering the question of the damage done to the land not taken, if you find from the evidence that the entire tract taken as a whole was damaged, then you should allow for such damage. Evidence has been introduced tending to show what the effect the location of the defendant's road would have upon the plaintiff's land for division into town or suburban lots and sale for such purposes. This evidence was admitted to aid you in finding the real and actual fair market value of the plaintiff's land for any use or purpose which you may find from the evidence the land was reasonably adapted for. You are not allowed to fix any specula-

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tive value upon the plaintiff's land, based upon what the same might in the future be worth, but to find from the evidence and your own observation what the land before and after the location of the defendant's road was fairly worth in the market as it was at said times."

As to the fourth instruction it is sufficient to say that there was no controversy about the amount of land taken. The only contention was that a part of said amount had previously been within the limits of a public highway, and the right of defendant in error to recover therefor has already been considered.

Plaintiff in error has no cause to complain of the eighth instruction. If the value of the property is diminished in consequence of its exposure to fire and the like, that fact was proper to be considered by the jury, as bearing upon the question of value.

The ninth instruction correctly states the law. The fact that the land of the defendant in error was susceptible of division into suburban lots before the construction of the track and that it is now useless for such purpose, would certainly entitle him to recover, provided the effect thereof would be to diminish the value of the entire tract.

We have examined the whole record and see no ground for reversal of the judgment of the district court.

AFFIRMED.

THE other judges concur.

WILLIAM A. POLLOCK, APPELLEE, V. BEDFORD B. BOYD,
APPELLANT.

FILED MARCH 1, 1893. No. 4487.

1. **Judgments: RESTRAINING COLLECTION: IRREGULARITIES: REVIEW.** A court of equity will not enjoin the collection of a judgment at law on account of mere irregularities or errors on the part of the trial court. Errors at the trial or in the proceedings must be corrected in the trial court or by direct proceeding in the appellate court.
2. **Judgments by Default: VALIDITY OF ORDER SETTING ASIDE: IRREGULARITIES: ASSIGNMENT: LIEN OF ASSIGNEE: CANCELLATION.** One V. obtained judgment by default against P. in the county court of C. county. Within ten days thereafter P. filed a petition to vacate said judgment for various reasons, but containing all the allegations necessary to entitle him to have it set aside under the provisions of section 1001 of the Code. A summons was issued for V. and personally served, giving him more than five days' notice of the time set for hearing said petition. At the time named V. appeared and demurred to the petition, but made no objection on the ground that P. had mistaken his remedy. The court having ordered that the judgment be set aside and P. allowed to answer, the case was continued from time to time on the application of V. and finally dismissed for want of prosecution. V. subsequently executed an assignment of said judgment to B., who procured a transcript of so much of the proceedings in the county court as included the judgment and caused it to be filed and docketed in the office of the district court of said county and demanded and threatened to procure an execution thereon and cause the lands of P. in said county to be sold to satisfy said pretended judgment. In an action by P. to enjoin such execution and levy and to remove the cloud upon his title caused by said pretended judgment, *held*, that the action of the county court in setting aside said judgment upon the petition instead of a motion was a mere irregularity and the order in question is not void for want of jurisdiction.
3. **Evidence examined, and held to sustain the decree of the district court.**

APPEAL from the district court of Cedar county. Heard below before NORRIS, J.

B. B. Boyd and J. C. Crawford, for appellant.

Barnes & Tyler and H. A. Miller & Son, contra.

POST, J

This is an action in equity and was tried in the district court of Cedar county, resulting in a decree for the appellee, who was plaintiff therein, and from which the defendant appeals.

The petition states in substance that on or about the 9th of March, 1886, one Robert J. Valentine obtained a judgment against the plaintiff in the county court of Cedar county, by default, for the sum of \$538.08 and costs taxed at \$18.10; that afterwards said default judgment was set aside and defendant allowed to enter his appearance and defend, and afterward, on the 13th day of July, 1886, said cause was finally dismissed at the costs of the said Valentine; that on or about the 15th day of November, 1888, and long after said cause of action was finally dismissed, the defendant procured from the said Valentine an assignment of said pretended judgment, and on the 6th day of December, 1888, procured from the county judge of Cedar county a transcript of so much of the proceedings in said cause as showed the judgment against the plaintiff, purposely omitting the further proceedings setting aside said judgment and the final dismissal of said cause; that on the 6th day of November, 1888, defendant filed his said pretended transcript in the office of the clerk of the district court of Cedar county, and caused the same to be entered on the judgment docket of said court, and indexed as a valid and subsisting judgment against the plaintiff; that at the time said pretended transcript of judgment was filed in the district court plaintiff was and still is the owner of a large

amount of real estate situated in said county, and that the said pretended judgment appears to be a lien upon the said lands of plaintiff and casts a cloud upon his title to the same; that said defendant threatens to have execution issued on his said pretended judgment, and to levy the same on the lands of plaintiff, to sell the same thereunder, and will perform such unlawful acts unless restrained by the order of the court, etc.

The prayer of the petition is for a restraining order and that on a final hearing said pretended judgment be canceled and set aside, and the cloud removed from plaintiff's title, and for general equity relief.

The answer of defendant admits so much of the facts stated in the petition as relates to the entry of the judgment by default and the assignment of the judgment to defendant, and denies all of the other allegations thereof.

The real contention of the appellant is that the action of the county court in setting aside the judgment by default was without jurisdiction and void. On the 15th day of March, six days after the rendition of the judgment against him, the appellee Pollock filed in the county court a petition to vacate said judgment, and caused a summons to be issued for Valentine, the plaintiff therein. On the 26th day of March said summons was returned, showing personal service in due form. It also appears from the record that on the 5th day of April, the day set for the hearing of said petition, the said Valentine appeared by attorney and demurred to the petition for a new trial, which was sustained as to the first count and overruled as to the second count thereof, and a stipulation was filed allowing appellee until April 12 to amend his petition for a new trial, and allowing Valentine until April 17 to answer; that on the day last named said Valentine filed a demurrer to the amended petition, which was overruled, and there being no further appearance it was ordered that said judgment be set aside and vacated, and appellee Pol-

Pollock v. Boyd.

lock permitted to enter his appearance and defend on condition that he pay the costs taxed at \$16.40 on or before the 3d day of May following. It also appears that said condition was performed by payment in full of the costs on the day last named. It further appears that on the 10th day of May the appellee filed a motion to require Valentine, plaintiff therein, to attach to his petition an itemized copy of his account, which was overruled; also, that the said plaintiff filed an amended petition on the 7th day of June, a second on the 11th of June, and a third on the 21st of the same month; that on the 6th day of July he again obtained leave to amend by the 13th of that month, on which day, having failed to amend in accordance with the order of the court, the action was dismissed for want of prosecution. At the time, therefore, of the assignment by Valentine to the appellant the latter had notice of all the facts disclosed by the record, and his equities are certainly not superior to those of his assignor. Appellee was entitled to have the judgment rendered against him in his absence set aside on motion and payment of costs if made within ten days. (Civil Code, 1001.) While the proceeding by petition was irregular it is clear that the order setting aside the judgment is not void for want of jurisdiction. The petition contains all the allegations required in a motion, and seems to have been so regarded by the court, which evidently disregarded the unnecessary allegations and granted the relief to which the appellee was entitled. Valentine, the plaintiff in that action, had notice of the application within the statutory time and appeared, but made no objection on the ground that the remedy of the appellee was by a proceeding entitled a motion instead of a petition. He also, subsequent to the setting aside of the judgment, continued to invoke the power of the court by filing amended petitions claiming judgment against the appellee for the same cause of action. Had he desired to have the order in question reviewed, it should have been

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done in a direct proceeding. There is no equity in his present position, hence the decree of the district court is right and should be

AFFIRMED.

THE other judges concur.

**MARY SHEEDY, APPELLEE, v. DENNIS SHEEDY ET AL.,
APPELLANTS.**

36	375
60	720
36	373
61	330

FILED MARCH 1, 1893. No. 5832.

1. **Administration: ALLOWANCE TO WIDOW: APPEAL FROM COUNTY COURT: ISSUES IN APPELLATE COURT: JURY TRIAL.**
On appeal by the executor or heir at law from an order of the county court making an allowance out of the funds of the estate of a deceased person for the support of his widow, the district court will try and determine the issues involved in the same manner as on appeals in civil cases. It is error in such case to refuse a jury trial upon the demand of either party to the controversy.
2. **Evidence examined, and held not to sustain the finding and judgment of the district court.**

APPEAL from the district court of Lancaster county.
Heard below before TIBBETS, J.

Marquett, Devesee & Hall, for appellants.

Charles O. Whedon, contra.

Post, J.

This is an appeal from a judgment of the district court of Lancaster county, confirming an order of the county court of said county allowing to the appellee Mary Sheedy, widow of John Sheedy, deceased, for her support out of

Sheedy v. Sheedy.

the funds of said estate, the sum of \$83.33 per month until the further order of said court. The first error alleged is the refusal by the district court of a jury trial, when demanded by appellants. The proceedings in this case are governed by the provisions of section 47, chapter 20, Compiled Statutes, as follows: "Upon the filing of such transcript in the district court, that court shall be possessed of the action, and shall proceed to hear, try, and determine the same in like manner as upon appeals brought upon the judgment of the same court in civil actions." Civil actions which come into the district court by appeal from the county court, or from justices of the peace, are triable by jury in the absence of a special provision upon the subject. It follows, therefore, that the district court erred in denying the request of appellants for a jury trial.

2. A careful examination of the bill of exceptions has satisfied us that the judgment in this case is not supported by the proofs, and that the finding should have been against the appellee upon the merits of the case. There is nothing in the record from which the date of death of the deceased John Sheedy can be inferred, except the fact that the appellee was, by a previous order of the county court, allowed a year's support out of the funds of the estate at the rate of \$83.33 per month, from and after March 19, 1891, which had been paid in full previous to the institution of this proceeding. She had also been allowed various sums, amounting in the aggregate to \$500, which had also been paid. She was also allowed, and received, all of the household furniture, including a piano, also a horse and buggy and harness. The value of the personal estate of the deceased does not appear, but it is evidently trifling, since the claims allowed against the estate, amounting to \$3,000, including the undertaker's bill, remained wholly unpaid at the time of the trial before the district court. The real estate of the deceased, exceeding \$100,000 in value, does not appear to be especially productive, inasmuch as the rents there-

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from have been mostly absorbed by the allowances to the appellee, leaving a balance insufficient to pay the taxes thereon and redeem a part of it which had previously been sold for delinquent taxes. The appellee, who is now a resident of California, did not testify in her own behalf, the only evidence in support of her claim being the testimony of her attorney, Mr. Whedon. According to the testimony of the latter, he is informed by the appellee that she is in need of money for her support and maintenance. It is also in evidence that appellee had previously brought suit in the district court for partition of the real estate of the deceased between herself and the appellants, that said cause had been tried and submitted to the court and was then under advisement before one of the judges thereof. There was, therefore, nothing wanting at the time but the judgment of the court in the partition suit to entitle her to possession of her distributive share of the estate. There is but one inference from the facts appearing of record, viz., that she has long since received in full the interest in the estate of her deceased husband to which she was by law entitled. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

F. W. RAGOSS ET AL. V. CUMING COUNTY.

FILED MARCH 16, 1893. No. 5055.

1. **County Clerks: DEPUTIES: SALARIES: COUNTY BOARD.** Under the provisions of sec. 42, ch. 28, Comp. Stats., where the fees of the county clerk exceed \$1,500, the county board may appoint such number of deputies as may be necessary and fix their sal-

36	375
43	267
36	375
46	35
36	375
448	15
36	375
55	155
36	375
461	414
61	481
61	662

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ary at not to exceed \$700, the same to be paid out of the fees received by the clerk.

2. ———: ———: ———: ———. Where the county board has appointed a deputy and fixed his salary, and he has actually rendered the service, those facts may be proved even if there is no record of the order in the minutes of the county board.
3. **County Board: ORDERS: COLLATERAL ATTACK.** Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally, except for fraud.

ERROR from the district court of Cuming county. Tried below before NORRIS, J.

T. M. Franse, J. C. Crawford, and M. McLaughlin, for plaintiffs in error.

H. C. Brome and P. M. Moodie, contra.

MAXWELL, CH. J.

In 1881 Ragoss was elected county clerk of Cuming county and held the office for four years. The county board settled with him from time to time, and so far as appears he settled in full when he left the office. Afterwards this action was brought on his official bond to recover fees collected by him while in office. The fees claimed are as follows:

SCHEDULE "A."—FEES ENTERED UPON FEE BOOK.

1882.

For recording deeds.....	\$656 00
For recording mortgages.....	381 05
For filing chattel mortgages.....	52 05
For recording chattel mortgages.....	5 25
For recording miscellaneous instruments.....	60 63
For making abstracts	108 55

1883.

For recording deeds.....	660 00
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Ragoss v. Cuming County.

For recording mortgages.....	\$392 10
For filing chattel mortgages.....	16 10
For recording chattel mortgages.....	4 00
For recording mechanics' liens.....	16 50
For recording miscellaneous instruments.....	59 25
For making abstracts	148 75

Total entered on fee book.....\$2,560 83

SCHEDULE "B."—FEES RECEIVED AND NOT ENTERED
ON FEE BOOK.

1882.

For recording deeds.....	\$74 25
For recording mortgages.....	115 50
For filing chattel mortgages.....	25 60
For recording chattel mortgages.....	4 00
For salary as clerk of board.....	400 00
For making assessors' books.....	100 00
For extra services	82 25

EXHIBIT "A."—2.

For services as commissioner of insanity.....	30 00
For making tax list.....	600 00
For making abstracts	560 59
Fees as clerk of district court.....	61 67

1883.

For recording deeds.....	119 00
For recording mortgages.....	125 50
For recording chattel mortgages.....	9 00
For filing chattel mortgages.....	60 40
For recording mechanics' liens.....	5 50
For recording miscellaneous instruments.....	8 25
For salary as clerk of board.....	400 00
For making assessors' books.....	100 00
For fees in state cases.....	142 73
For fees as commissioner of insanity.....	6 50
For miscellaneous.....	12 75
For recording official bonds.....	30 00

Ragoss v. Cuming County.

Searching records in West Point precinct case...	\$24 00
For making tax list.....	650 00
For making abstracts	500 00
For fees as clerk of district court.....	358 67

Total amount of fees received during said years and not entered on fee book.....	\$4,606 99
Adding fees so entered.....	2,560 83
Making grand total.....	\$7,166 99
Deducting statutory allowance.....	3,000 00
	<u>\$4,166 99</u>

To the petition Ragoss filed an answer as follows:

"Now comes the defendant F. W. Ragoss, and for answer to plaintiff's petition filed herein says:

"1st. He admits the allegations contained in the first paragraph of said petition.

"2d. He admits that by virtue of his election for the said office he held and exercised the functions of said office of county clerk of Cuming county, Nebraska, from the 5th day of January, 1882, to the 9th day of January, 1884; that during the said term he received as fees and entered upon the fee book the sum of \$2,560.83; that he has not paid into the treasury of said Cuming county any portion of the fees received by him during said term.

"3d. That he denies each and every other allegation in plaintiff's petition contained, except what is hereinbefore expressly admitted.

"4th. That he did report to the said board of county commissioners all fees received by him, and for which he was properly chargeable, and made a full, complete, and satisfactory settlement with said board of county commissioners and received a full receipt and discharge for all fees received by him during his said term of office, from which settlement and allowance no appeal has ever been taken.

Ragoss v. Cuming County.

"5th. That at the time he entered upon the duties of said office there was a large amount of work in said office, and that in conformity to law, and with the permission, consent, and under the direction of said board of commissioners he employed a deputy clerk at a salary of \$700 per annum, and two assistant clerks at \$600 per annum each for the time actually employed, and paid to said deputy and assistant clerks the sum of \$1,900 per annum, which, together with the \$1,500 per annum allowed him by law, exceeded the amount of fees by him collected and for which he was properly chargeable.

"6th. That the employment of said deputy and assistant clerks was made upon application by him to the county board of county commissioners of said county, and upon their allowance, consent, approbation, and authority.

"7th. That inasmuch as the said plaintiff did not exhibit his said petition against this defendant within four years from the time the action accrued on the several items set out in said petition each and every item thereof is barred by the statute of limitations, and the plaintiff ought not to be permitted to prosecute the same.

"Wherefore defendant prays that he may be dismissed, and go hence without day and recover his costs in this case most wrongfully sustained."

The sureties also filed an answer which need not be noticed.

On the trial of the cause the court directed the jury to return a verdict for the county for the sum of \$2,327.21. The jury thereupon returned a verdict for the sum named, upon which judgment was rendered. The items upon which this instruction is based are as follows:

For making tax list 1882.....	\$600 00
For extra services 1882.....	82 25
For making assessors' books 1882.....	100 00
For making tax list 1883.....	650 00
For making assessors' books 1883	100 00
For searching records West Point precinct case...	24 00

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Ragoss entered upon the duties of his office in January, 1883. He seems to have been allowed one deputy to be paid out of the fees of his office. He offered to prove that a deputy named Hirschman had been appointed at a salary of \$700 per year. This was objected to as "immaterial, not the best evidence, and incompetent." The objections were sustained and the evidence excluded. The defendants then offered "to prove by the witness on the stand and by the questions asked and ruled out that on or about the 10th day of January, 1882, F. W. Ragoss, county clerk of Cuming county, Nebraska, applied to the board of county commissioners for the privilege to appoint a deputy during his term of office; that said board of county commissioners found that it was necessary for him to have a deputy and empowered said F. W. Ragoss to appoint such deputy for the term for which he was elected and fixed the salary of such deputy at \$700 per year, of which the commissioners made no record and there is no record of their proceedings; that he thereupon appointed such deputy for the term of two years at the salary of \$700 per year. Plaintiff objects, as being incompetent, irrelevant, and immaterial, and not the best evidence. Objections sustained by the court. All of the defendants at the time severally except." In this the court clearly erred. The county board had authority to appoint a deputy, and if one was actually appointed it should have been shown. In April of that year the county board made an order as follows:

"APRIL 10, 1882.

"The board of county commissioners of Cuming county met pursuant to adjournment. Members present: C. Paul, Chas. Schulth, and W. W. Cones. The following proceedings were had: Minutes of last meeting read and approved, etc. In consideration of the application of the county clerk for assistants, and further considering that said county clerk and his deputy are insufficient to overcome their office work, therefore it was moved, seconded,

Ragoss v. Cuming County.

and carried that the county clerk be and is hereby empowered to hire one or two assistants, as he shall deem necessary, besides the deputy, at \$600 salary a year; each said assistants are to be paid by him out of the overplus of fees, respectively all that is over \$1,500 a year and deputy's salary; above allowance shall be counted from the commencement of his official term. Whereupon board adjourned until April 17, 1882.

"CON. PAUL.

"CHAS. SCHULTH.

"W. W. CONES.

"Attest:

"F. W. RAGOSS, *County Clerk.*"

The plaintiff in error also offered the following:

"MR. CRAWFORD: The defendants offer to prove by the foregoing questions that the county commissioners made no record of the application of F. W. Ragoss for the allowance of a deputy or of their action thereon, and that he did employ such deputy for the term of two years and pay him the sum of \$700 per year. Plaintiff objects, as being incompetent, irrelevant, and immaterial, and that no proper foundation is laid. Objections sustained by the court. All of the defendants at the time severally except.

"MR. CRAWFORD: Defendants' counsel offers in evidence the official bond of C. Hirschman, deputy county clerk of Cuming county, Nebraska, for the term commencing in January, 1882, and ending in January, 1884, with the approval thereof by the commissioners of Cuming county as indorsed thereon. Plaintiff objects, as being immaterial. Objections sustained by the court. All of the defendants severally except."

Other testimony of like character was offered and excluded. The testimony also shows that the clerk made quarterly reports of his fees. Some of these reports were submitted to the county attorney and seem to have been approved by him.

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Section 42, chapter 28, Compiled Statutes, provides "that every county * * * clerk * * * of each county, whose fees shall in the aggregate exceed the sum of \$1,500, * * * shall pay such excess into the treasury of the county," etc. "*Provided*, That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies not exceeding the sum of \$700 per year for each of such deputies or assistants, except in counties having over 70,000 inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the board; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services; *Provided further*, That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

Section 43 requires a quarterly report on the first Tuesday of January, April, July, and October of each year.

Section 44 requires the officer to keep a fee book, wherein shall be entered all fees received, etc.

Section 45 provides a penalty for neglect of any of these duties.

The general supervision of the clerk's office is in the county board. It is its duty to see that the duties of the office are properly and faithfully performed. Where the fees exceed \$1,500, so much of the surplus as may be necessary may be applied to the payment of deputies. No money can be drawn from the treasury for that purpose, but

Ragoss v. Cumling County.

only so much of the surplus fees as may be necessary. Now the county board, being present and seeing what was necessary, as they supposed, authorized Ragoss to employ certain deputies and fixed their compensation. This was strictly within their powers and duties, and their action therein at most would be erroneous and is not, in the absence of fraud or collusion, open to collateral attack. So of the orders allowing the application of fees to the payment of such salaries. In this state such an order is in the nature of a final judgment. (*Brown v. Otoe County*, 6 Neb., 111; *Clark v. Dayton*, 6 Id., 192.) In both of the cases cited it was held that an appeal must be taken to the district court or the allowance of the claim would be conclusive. The case of *State v. Silver*, 9 Neb., 86, does not contravene this rule. In that case a *mandamus* was brought to require the county clerk to report fees received by him for making out the tax list and the writ was granted. *Bayha v. Webster County*, 18 Neb., 131, was an appeal from the order of the county board disallowing a claim for making out the tax list and therefore not like the case at bar. A county board in allowing a claim which the law authorizes them to act upon may make an honest mistake, and allow or disallow an order. If any person is aggrieved thereby the law provides an adequate remedy by appeal. There should be an end to litigation, and an officer who has faithfully performed the duties of his office and made a full settlement with the tribunal authorized to settle the same should be permitted to rest on such settlement, unless there is fraud, mistake, or imposition in making the same. The court erred in the exclusion of the testimony and in directing a verdict, but should have submitted all the facts under proper instructions to the jury. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

Me. T. am v. Goodlett.

36	384
147	123
048	412

36	384
56	386

36	384
62	250
62	642

**LYDIA MERRIAM, APPELLANT, v. JOHN A. GOODLETT
ET AL., APPELLEES.**

FILED MARCH 16, 1893. No. 4850.

1. **Contract to Convey Real Estate: LACHES: SPECIFIC PERFORMANCE.** One A. purchased certain real estate, and in pursuance of the contract entered into possession of the property and made improvements thereon. The contract contained a provision that time should be the essence of the contract. *Held*, That the circumstances of the case were not such as to make time the essence of the contract, and that a failure to perform at the day would not prevent the specific enforcement of the contract.
2. ———: ———: **WAIVER.** Where time originally is the essence of the contract, and the contracting party intends to insist on the stipulation and to put an end to the contract, he must do no act that can be construed into a waiver of the stipulation.
3. **Tax Lien: FORECLOSURE: DECREE: TITLE.** A tax lien on the land itself takes precedence of all other liens, and a decree foreclosing the same, and a sale thereunder, where all persons affected thereby are before the court, transfers to the purchaser under the decree an absolute title in fee of the land.
4. ———: ———: ———: **REDEMPTION.** If parties affected are not before the court their remedy is an action to redeem. If the court had jurisdiction the decree cannot be treated as void.
5. **Quieting Title: EQUITY.** A plaintiff filed a petition to remove a cloud from his title caused by an outstanding contract for the sale of the land, and also to remove a cloud caused by a mortgage, which it was alleged was barred by the statute of limitations. *Held*, That to entitle him to affirmative relief he must do equity by paying the amount due on the mortgage; but as the court had dismissed his petition for want of equity, he would not be required to pay the amount due on the barred mortgage.
6. **Mortgage Foreclosure: LIMITATIONS.** An action to foreclose a mortgage is barred in ten years from the time the debt becomes due, or from the date of the last payment or a new promise to pay the same, and under section 17 of the Code the time is not extended by the absence of the defendant from the state.

APPEAL from the district court of Otoe county. Heard below before CHAPMAN, J.

C. W. Seymour, for appellant.

Edwin F. Warren, contra.

MAXWELL, CH. J.

This is an action brought by the plaintiff in the district court of Otoe county to have a certain contract for the sale of lots 1, 2, 3, 4, 5, and 6, in block 168, in Nebraska City proper, canceled and held for naught, and to have a mortgage executed by one Boies to Paine & Co., in 1874, declared barred and satisfied, etc., and to quiet and confirm the title in the plaintiff. The contract under which the Goodletts hold is as follows: "I, S. N. Merriam, am held and firmly bound unto Jennie H. Goodlett in the sum of \$1,500, conditioned that I will, time being the essence of this contract, on the first day of September, A. D. 1888, and on the full payment of her promissory note for \$100 due on said date, payable to W. D. Merriam, make, execute, and deliver to said Jennie H. Goodlett a warranty deed, except for the taxes accruing after that for the year 1881, for the following described real estate, to-wit: One, two, three, four, five, and six (1, 2, 3, 4, 5, and 6), in block one hundred and sixty-eight, Nebraska City, county of Otoe, state of Nebraska.

"Conditioned also that the said Jennie H. Goodlett, at the same time, execute and deliver to me a mortgage on said premises to secure three promissory notes for three hundred dollars, each bearing date on this day, payable to W. D. Merriam, in which mortgage her husband, John A. Goodlett, shall join, and provided said Jennie H. Goodlett shall insure said property, not less than six hundred dollars, for the benefit of said W. D. Merriam in case of the non-payment of any of the three said promissory notes and in case of loss of houses and premises by fire, said insurance policy

Merriam v. Goodlett.

to be obtained by the first day of July, 1883. Dated and signed at Nebraska City this 15th day of April, 1880.

"S. N. MERRIAM,

"By W. D. MERRIAM,

"*His Attorney in Fact.*

"In presence of

"G. W. COVELL."

This is duly acknowledged.

There is a second count in the petition for rents and profits.

Paine & Co. answer in effect that Boies executed a mortgage for \$1,200 to them in 1874; that no part of the same has been paid; that Boies has been absent from the state nearly all the time since said mortgage became due, and that the same is now due and payable.

Goodlett and wife answer, in effect, that they have paid the interest promptly on said purchase as the same became due, and that such payments were accepted and credited to them by W. D. Merriam. They also allege that W. D. Merriam is the real party in interest in the case, and ask that he be made a plaintiff. They also allege that in 1888 they tendered the whole amount due on said lots to W. D. Merriam and demanded a warranty deed as provided in said contract, but the said Merriam refused to execute the same. They also allege that Paine & Co. claim a lien on the premises by virtue of said mortgage. They also allege that one Mathes did possess a tax lien on said lots, which he has assigned to Merriam.

In reply the plaintiff alleges proceedings in the United States circuit court for the foreclosure of tax liens on the premises and that he purchased the same under the decree.

On the trial of the cause the court held that W. D. Merriam was the real party in interest and was declared the plaintiff; that plaintiff's petition be dismissed; that Paine & Co. have a foreclosure of their mortgage, the amount found due exceeding \$5,000; that the amount due from

Merriam v. Goodlett.

the Goodletts to W. D. Merriam was \$1,000; that the tax lien of Mathes had been assigned to the plaintiff before the commencement of the action; that W. D. Merriam specifically perform the contract with said Goodletts upon payment of \$1,000, and convey said premises to her free of incumbrances; that Merriam pay the Paine Company the sum of \$5,260, and that said lots be sold according to law to satisfy the same, etc.

It appears from the testimony that in 1878 Thaddeus W. Boies, the then owner of the lots in question, filed a petition in the district court of Otoe county to have the taxes and tax deeds of Selden N. Merriam on the lots in question declared null and void and not a cloud upon his title to the same. This cause, on the petition of Merriam, was removed into the United States circuit court for Nebraska. An answer was filed in that court, and in 1880 the following decree was entered:

"On reading and filing the said report of said Dwight G. Hull, master in chancery of this court, which report bears date the 31st day of May, A. D. 1880, and was in pursuance of an order of the court, heretofore made in this cause, referring it to said master to report the facts and find the law in said cause, from which it appears that the complainant, Thaddeus W. Boies, was the owner and in peaceable possession of lots numbered one, two, three, four, five, and six, in block numbered one hundred and sixty-eight, in Nebraska City, Otoe county, Nebraska; that on the 23d day of February, A. D. 1876, the said lots above described were sold by the then treasurer of Otoe county for the delinquent taxes of 1873, at private sale, by the assignee of defendant Merriam; that the holder and owner of said tax certificate has paid the taxes upon the said lots both prior and subsequent to said date; that from 1869 to 1875 the complainant had abundance of personal property in Otoe county out of which said taxes might have been made; that the tax sale of said real estate was

Merriam v. Goodlett.

illegal and void, and that said pretended tax deed is void upon its face; that said respondent, Selden N. Merriam, should be subrogated to the rights of the county, and should be decreed to have a lien upon said real estate for all taxes paid, with twelve per cent interest from the date of such payment, and that there was due from said Thaddeus W. Boies, complainant, to the respondent, Selden N. Merriam, at the date of said report, to-wit, on the 31st day of May, 1880, for said principal and interest by reason of said tax purchase, the sum of nine hundred and two $\frac{3}{100}$ dollars. Whereupon it is ordered, adjudged, and decreed by the court that the exceptions to the said master's report filed herein be and the same are hereby overruled. And on motion of C. W. Seymour, counsel for the complainant, it is ordered, adjudged, and decreed, and this court doth order, adjudge, and decree, and that said report, and all things therein contained, stand ratified and confirmed.

"And it is further ordered, adjudged, and decreed that the said complainant, Thaddeus W. Boies, pay, or cause to be paid, to the respondent, Selden N. Merriam, the amount so reported due as aforesaid, together with ten per cent interest thereon from the date of said report, to-wit, the 31st day of May, A. D. 1880, on or before the 12th day of May, A. D. 1881. And in default thereof, that all and singular the said premises described and mentioned in said master's report made in this cause, to-wit, lots numbered one, two, three, four, five, and six, in block numbered one hundred and sixty-eight, in Nebraska City, Otoe county, state of Nebraska, or so much thereof as may be sufficient to raise the amount due the respondent for said principal and interest in this case, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of William Daily."

The court then proceeds to direct the procedure in conducting the sale, and taxed the costs, amounting to \$116.45, to Merriam.

In 1881 the lots in question were sold under the decree and purchased by Selden N. Merriam for the sum of \$800. The sale was reported to the court and confirmed, and a deed made to the said Merriam for the lots in question. In 1883 Merriam sold the lots in controversy to Mrs. Goodlett. It will be observed that in the contract of purchase time is made the essence of the contract and a failure to pay at the day is declared to be a cause of forfeiture. In equity time is not in general the essence of the contract, and under certain circumstances may be disregarded. In *Lennon v. Napper*, 2 Sch. & Lef. [Ir. Ch. R.], 684, Redesdale, J., says: "The courts, in all cases of contracts for estates of land, have been in the habit of relieving where the party from his own neglect had suffered a lapse of time, and from that, or other circumstance, could not maintain an action to recover damages at law." There are cases where time may be made the essence of a contract—as where a condition precedent, such as payment, is to be performed by a certain time before the vesting of any estate. (*Hatch v. Cobb*, 4 Johns. Ch. [N. Y.], 559; *Kempshall v. Stone*, 5 Id., 193.) So where it was agreed that the vendee should erect a house on the land by a day named, and make the first payment of the purchase price, and he did neither, and it was further agreed that if the vendee should fail to perform any of his covenants at the day that his rights under the contract should cease, it was held that the parties had made time essential. (*Wells v. Smith*, 7 Paige [N. Y.], 22; *Benedict v. Lynch*, 1 Johns. Ch. [N. Y.], 370.) In *Edgerton v. Peckham*, 11 Paige [N. Y.], 352, the contract contained a provision that if the vendee made default in any of his payments that he should forfeit the previous payments. This was held not a bar to specific performance. In *Edgerton v. Peckham*, *supra*, Gridley, V. C., in an able review of the authorities up to the year 1844, says:

"1. Time may have become of the essence of the contract by the rise or depreciation of the value of the prem-

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ises contracted to be sold. And, therefore, one who has given evidence of the abandonment of the contract, by lying by to see whether it will or will not be a bargain to take the property, will not be relieved, though he may have paid some portion of the purchase money. And gross negligence is evidence of an abandonment which will be a bar to a bill for relief. This doctrine is advanced in and supported by a great variety of cases. (13 Ves., 244; 5 Id., 818, 720; s. c., 4 Id., 667; 4 John., 494; 3 John. Ch., 370.)

"2. Time may be of the essence of the contract, by reason of the nature of the interest in the property which is to be conveyed. Contracts for the purchase of stock are of this description; and the reason assigned is that the daily fluctuations in the price would render a punctual performance of the essence of the contract. (See 4 Ves., 492; 1 Sim. & Stew., 59.) So also in the case of the sale of a reversionary interest, where the vendor may be supposed to be in want of the consideration money, and to whom it is of importance that the money should be paid punctually. (*Newman v. Rogers*, 4 Bro. C. C., 391; *Ormond v. Anderson*, 2 Ball & Beat., 370.) So where there is an agreement to sell at a valuation, to be made within a certain time, by persons who are named. (6 Mad., 26.) So also in a sale of a lease depending on lives. (*Ormond v. Anderson*, 2 Ball & Beat., 370.) There a distinction is taken between such a case and a case of purchase, where time is said to be not of the essence of the contract, as a compensation for the delay may be paid in the interest, etc.

"3. Time may be of the essence of the contract when there is an express stipulation to that effect, and where the contract is executory at the time of the default; no part or no considerable part of the purchase money having been paid. And this is on a very plain principle, to-wit, that the performance, by the vendee, is a condition precedent to the performance of the contract by the vendor. It is believed that most of the modern cases which have been sup-

posed to establish the rule that a mere naked default will *ipso facto* work a forfeiture, not relievable in equity, will be found to fall within this class of cases, or the one last above mentioned. Such was the case of *Wells v. Smith*, 2 Edw. Ch. Rep., 78. There no part of the consideration money had been paid, though some money had been expended on the premises."

He also cites the cases where time has been the essence of the contract, but there has been a waiver by accepting payment while the vendee was in default. A court of equity looks to the substance of a contract, and when that is fulfilled and the general intention of the parties carried into effect, the court will relieve from any forfeiture or penalty inserted for the purpose of enforcing the contract. (Jeremy, Eq. Juris., 470; Fonbl. Eq. (4th Am. ed.), 130; *Edgerton v. Peckham*, 11 Paige [N. Y.], 358.) In the case at bar the substance of the contract was a sale of the lots in question to the Goodletts for a specified price with annual interest. The Goodletts, in pursuance of the contract, entered into possession and have retained the possession, paying the taxes and expending considerable sums in improvements thereon, etc. The interest has been paid or tendered up to the time of bringing this suit. There is no circumstance, therefore, that would make time the essence of the contract and thus rob the purchaser of his estate. But even if time was the essence of the contract, it has been waived by the acceptance of the interest while the Goodletts were in default. They are, therefore, entitled upon payment of the purchase price to specific performance of the contract.

It will be observed that Merriam derives his title to the lots in question through a decree of the United States circuit court foreclosing tax liens, and a sale thereunder, which was duly confirmed and a deed made to the purchaser. It will be observed also that many of these taxes antedate the mortgage to Paine & Co. Taxes assessed upon real estate constitute a lien thereon from the first day of April in each

year. A lien for taxes takes precedence of all other liens where the tax is assessed upon the land itself and not upon any particular interest therein (*Post v. Leet*, 8 Paige [N. Y.], 337; *Kern v. Towsley*, 45 Barb. [N. Y.], 150; *Dowdney v. New York*, 54 N. Y., 186; *Cochran v. Guild*, 106 Mass., 29; *Parker v. Baxter*, 2 Gray [Mass.], 185; *Cooley, Taxation*, 306; *D'Gette v. Sheldon*, 27 Neb., 829); and a change in the ownership will not affect the lien, as the law takes no notice of such change (*Oldham v. Jones*, 5 B. Mon. [Ky.], 458; *Covington v. Boyle*, 6 Bush [Ky.], 204; *Cooley, Taxation*, 306). The foreclosure, therefore, extinguished the mortgage lien, even if it is not barred by the statute of limitations. As the mortgagee was not a party, if the mortgage lien is not barred, no doubt he could proceed in an action to redeem by setting up the necessary facts to entitle him to such relief. He must bring his action within the statutory period, however. An attempt was made to show that Boies was a non-resident of the state, and the statute of limitations did not run against him. There was some proof introduced tending to show that he had previously resided at Seward; that he had removed from there to Colorado or Kansas, but his family was still residing in Seward county. There is also proof that he was fearful that service of summons would be made upon him in Lancaster or Seward counties. Taking the proof all together, and it fails to show that Boies has been absent from this state for five years since the mortgage in question became due. Neither is it material when it is sought to enforce the mortgage against the land. The proviso to section 17 of the Code expressly excepts cases of foreclosure of real estate mortgages. Such foreclosure must be brought within ten years from the time the debt becomes due, or there is part payment or a new promise, or the action will be barred. In any view of the case, therefore, an action to foreclose the mortgage is barred. The plaintiff, however, by seeking to have the cloud re-

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moved from his title and to have it confirmed in him subjects himself to the equity rule that he that seeks equity must do equity. The rule, however, is imposed as a condition of granting relief. If relief is denied, the rule will not be applied. For reasons which will presently be stated the judgment dismissing the plaintiff's action must be affirmed and the plaintiff denied any relief. He will not be required, therefore, to assume the mortgage in question. The judgment is in form personal, although probably not so intended. In a case of this kind the purchaser under the tax liens did not assume the mortgage debt and he is not personally liable therefor. The remedy, if one exist, is confined to the land itself. The Goodletts, within sixty days, may pay to the clerk of this court the sum of \$1,000, with interest from the date of the decree in the court below. Upon the payment of which the plaintiff will be required to execute a deed as provided in the contract, and the money in question will not be delivered to him until the deed is made. The judgment will be modified to conform to this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

SARAH J. JAMES V. LUCY A. SUTTON.

FILED MARCH 16, 1893. No. 4569.

1. **Probate and Contest of Will: CAPACITY OF TESTATOR: EVIDENCE.** In an action to contest the probate of a will, the only issue being the capacity of the testator to make a will, *held*, that a verdict sustaining the will was supported by all the evidence.

2. ———: ———: ADMISSIBILITY OF EVIDENCE. In a contest over the probate of a will the parties objecting to such probate offered evidence tending to show that the testator many years before his death had given one of his children certain lands, describing them, etc., but had failed to convey the same. *Held*, Properly excluded, because it did not relate to the questions at issue, and if such gift had been made and possession given in pursuance thereof and the conditions complied with, those facts might be shown in a proper case to enforce, quiet, or confirm the title.

ERROR from the district court of Saline county. Tried below before MORRIS, J.

F. I. Foss, for plaintiff in error.

Hastings & McGintie, *contra*.

MAXWELL, CH. J.

The will of Hannibal Sutton of Saline county was admitted to probate on the 31st of February, 1889, and Lucy Sutton, the widow of Hannibal Sutton, named as executrix and granted letters testamentary. From the order admitting the will to probate an appeal was taken to the district court by a daughter of Hannibal Sutton. The objections filed by her to the probate of the will are as follows:

"And now comes the said Sarah J. James, plaintiff herein, and says that she is an heir at law of the said Hannibal Sutton, deceased, to-wit, the daughter of the said Hannibal Sutton, and she objects to the probating of the will of Hannibal Sutton, deceased, for the following reasons:

"1. She alleges that at the time the said will was executed that the said Hannibal Sutton was old, feeble, infirm, and of unsound mind.

"2. That the said Hannibal Sutton made said will under the influence, at the dictation, and by the request of his wife, Lucy A. Sutton, and that the said will was not the will of the said Hannibal Sutton, but the will of Lucy A. Sutton.

"3. That at the time said will was made the said Hannibal Sutton was not capable of making any will at all, and whatever was done was a nullity and absolutely void, and that the said Lucy A. Sutton, wife of Hannibal Sutton, procured Hannibal Sutton to make said will by fraud and undue influence which she practiced upon the said testator, and that the said Hannibal Sutton was not of sound and disposing mind and memory, and that she used undue influence upon him to accomplish the purpose of said will, made as it was at her dictation by the said Hannibal Sutton.

"4. Wherefore the plaintiff prays that a hearing may be had, and that upon final hearing the court may find that at the time said will was executed that the said Hannibal Sutton was of unsound mind and not capable of making a will; that fraud and undue influence were practiced upon him, and that the said will may be declared null and void, and that the plaintiff may recover her costs herein expended."

The answer is a general denial.

On the issues thus formed the cause was submitted to a jury, which made special findings as follows:

1. "Was Hannibal Sutton, at the time of the executing of the will, of sound mind, and did he execute it of his own free will without any restraint or undue influence being brought to bear upon him?

"Answer. Yes.

2. "Was any undue influence brought to bear upon Hannibal Sutton by any one at the time of making his will?

"Answer. No.

3. "Was this will in question executed by Hannibal Sutton of his own free will?

"Answer. Yes.

4. "Was Hannibal Sutton of sufficient sound mind to make a will at the time of making the will in question in this case?

"Answer. Yes."

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And there was a general verdict for the proponent, upon which judgment was rendered. The principal errors relied upon are that the verdict is against the weight of evidence, and that the court erred in excluding certain testimony. It will be observed that the principal question involved is the capacity of Mr. Sutton to make a will. The testimony tends to show that the contestant and a Mrs. Schook are daughters of Sutton by his first wife; that their mother died about fifteen years before the making of the will in question; that about a year after their mother died their father married a second time and two sons were the issue of the second marriage. The second marriage does not appear to have been entirely harmonious, and his wife did not live with him continuously, but for two or more years had resided on her own property some distance from that of Sutton. The place she resided on seems to have been given to her by her husband, and so far as we can see he felt an interest in the welfare of his wife and the living apart seems to have been without irritation. The testimony also shows that Sutton was in feeble health for several months before his death; that he was living on his own land with the person who rented the farm, and had lived with that family for two or more years; that about five weeks before his death he had a severe attack of an obscure disease and was compelled to remain in bed; that about three weeks before his death the will in question was made. Mr. E. A. Hancock, of De Witt, who prepared the will, testifies as follows:

Q. Now just state to the jury all the facts and transactions that occurred at that time—the day—how did you come to go there?

A. I think that Mr. Tierley or Mr. Tierley's boy stopped at my house, and left word that Mr. Sutton wanted me to come and see him, and that he wished me to write his will, and get prepared to write his will, and I accordingly, the next day, I think it was in the morning, went to his house, and he

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was in bed, and I was there some four to seven hours. I don't know how long, perhaps a third of a day. I took notes of what he wanted made, by his bed side, and then I went out in the other room and composed the will, and then came back, and in the presence of Mr. Tierley—I forget whether there was anybody else there or not, and read it over to him, and he sat up in bed, with a chair, I think, under him, bolstered up in bed, and he said that was all right; that that was just as he would have it, or something to that effect, and he signed it there, and we put our signatures as witnesses.

Q. During the time that you were there did you have any conversation with him?

A. Yes, sir, I had considerable conversation with him.

Q. About what matters?

A. About almost everything pertaining to his domestic relations, and his spiritual condition. He knew I was a minister of the gospel, as I had previously had conversation with him on that subject. This time we had a conversation on spiritual matters and his domestic relations, particularly in the presence of Mrs. Sutton, his wife.

Q. Who dictated what the terms of the will should be?

A. He alone.

Q. Did any one else dictate any portion of it?

A. Not a syllable or word.

There is no testimony in the record that fairly construed contradicts the testimony of Mr. Hancock. It is stated that Sutton was weak; that he seemed to be losing strength, etc., but there is no denial that he was rational and knew what he was doing when the will was made, and the verdict is sustained by all the evidence.

2. An attempt was made to prove that Sutton, a few years since, had given to one of his children 160 acres of land, but had failed to convey the same. This testimony was properly excluded. If such a gift was made and possession taken, in pursuance thereof, those facts may be shown

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in a proper action to obtain title and the fact that the land was afterwards bequeathed would not defeat it, if the conditions have been complied with. Upon the whole case it is apparent that the judgment is right and it is

AFFIRMED.

THE other judges concur.

**MONTAGUE T. HAMLEY ET AL., APPELLEES, V. GILMAN
O. DOE ET AL., APPELLANTS.**

FILED MARCH 16, 1893. No. 4600.

Action to Declare Deeds Mortgages and Redeem Land:

COMPROMISE BEFORE TRIAL: ENFORCEMENT. A conveyed certain real estate to B by an absolute deed to secure the payment of a loan. The trust character of this deed was recognized by the grantee, who at various times promised that upon a sale of the property he would pay him the surplus in excess of the loan and interest. Afterwards A brought an action against B to redeem, and offered to pay the loan with interest. While the action was pending A and B entered into a stipulation as to the amount which A should pay to B, whereupon he would recover the premises. *Held*, That in the absence of fraud or misrepresentation the agreement was binding upon the parties, and would be enforced.

APPEAL from the district court of Madison county.
Heard below before **POWERS, J.**

S. O. Campbell and Wigton & Whitham, for appellants.

Allen, Robinson & Reed, contra.

MAXWELL, CH. J.

This is an action to have certain deeds declared mortgages and to redeem the land. On the trial of the cause in

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the district court a decree was rendered declaring the deeds mortgages, finding the amount due thereon to be the sum of \$2,896, upon payment of the same to redeem the land. The action was brought in September, 1889, and in January, 1890, the parties entered into the following stipulation:

"The defendant Gilman O. Doe, recognizing the right of the plaintiffs to redeem said property, to-wit, the northwest quarter of section 24, and the northeast quarter of section 12, and the southeast quarter of section 1, all in township 23 north, of range 4 west of the 6 P. M., in Madison county, Nebraska, hereby stipulate and agree that in consideration of \$2,617 $\frac{52}{100}$ to be paid to the clerk of said court within sixty days from the date of the decree of said court, the said sum above named, on being paid as above stipulated, shall be received in full satisfaction of all claims of said defendant, and that the court may and shall enter a decree in favor of plaintiffs accordingly. And the said Gilman O. Doe hereby authorizes and empowers the clerk of said court to apply the above named amount on a certain mortgage held by one David Reynolds on the southeast quarter of section 1, and the northeast quarter of section 12, all of township 23 north, of range 4 west of the 6th P. M., towards the payment and in cancellation of said mortgage, and if there shall be any moneys left after satisfying said mortgage the surplus to be paid by the clerk of the said court to said Gilman O. Doe, and if, after paying said amount, there should be still money due the said David Reynolds on said mortgage the said Gilman O. Doe hereby agrees to pay on demand.

"GILMAN O. DOE.

"MONTAGUE T. HAMLEY.

"Dated, North Loup, Nebraska, January 11, 1890.

"In presence of A. J. THATCH."

It was filed January 23, 1890. Afterwards, and before the trial, the defendant Doe served notice on the plaintiff that

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he repudiated the stipulation and would not be bound by it. Notwithstanding this notice the court below admitted this stipulation in evidence, and this is the first error complained of. There was no error in admitting the stipulation. It was a settlement by the parties themselves of their dealings in relation to the land. There is no charge of fraud, misrepresentation, or unfairness, nor that there was an error in computation. The loan was made prior to 1879 at twelve per cent interest, and it is probable that the parties agreed to some reduction of that very high rate. However that may be, sufficient facts are not shown to justify the opening of the account and making a new computation. (*Kennedy v. Goodman*, 14 Neb., 588; *Hanley v. Noyes*, 28 N. W. Rep. [Minn.], 189; *Zimmer v. Becker*, 29 Id. [Wis.], 228; *Neibles v. Minneapolis & St. L. R. Co.*, 33 Id. [Minn.], 332; *Hall v. Wheeler*, 35 Id. [Minn.], 377.) Here was a proposition to permit redemption upon the payment of a certain sum. Suppose he had been the owner in fee and had made a proposition to sell to the plaintiff for the sum named, would any one contend that in the absence of fraud or misrepresentation that the sale would not be valid? I think not. The same principle applies in this case, and the agreement of the parties will be enforced. It is unnecessary to consider the other errors assigned. The judgment is right and is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. ARTHUR TRUESDELL,
V. CLAUS H. PLAMBECK, COUNTY JUDGE.

FILED MARCH 16, 1893. No. 5993.

1. **Mandamus: TITLE TO OFFICE.** The title to an office cannot be tried and determined on an application for a writ of *mandamus*.
2. ———: ———: **APPROVAL OF OFFICIAL BOND.** While *mandamus* is not the appropriate mode of trying the question of strict title to an office, yet, in such a proceeding brought to compel the respondent to approve the official bond, tendered by the relator, sufficient inquiry may be made to ascertain whether or not the relator's certificate of election or appointment is *prima facie* evidence of title to the office.
3. ———: ———: ———: **CERTIFICATE OF APPOINTMENT.** Dodge county is under township system of government. The territory comprising the city of Fremont constitutes a township in said county by said name, and is entitled to, and has been represented in the county board by two supervisors, chosen by the electors of said city. A vacancy having occurred in the office of one of the supervisors of said city, the relator was appointed by the mayor and city council of said city to fill such vacancy, who took the oath of office, executed a bond in due form, with sufficient sureties, and tendered the same within the time fixed by law to the respondent as county judge for approval. *Held*, That the certificate of appointment of the relator was *prima facie* evidence of his right to the office, and that it was the duty of the respondent to approve said bond and the sureties therein.

ORIGINAL application for *mandamus*.

F. Dolezal and *J. E. Frick*, for relator:

The title to an office is not to be passed upon or adjudicated in *mandamus*. (*State v. Jaynes*, 19 Neb., 164; *People v. Goetting*, 30 N. E. Rep. [N. Y.], 969.) The relator's certificate of appointment, with his official bond, was *prima facie* evidence of his title to the office, and the only question for the county judge was the sufficiency of the bond and sureties. He could not inquire into the validity

36	401
45	793
86	401
45	787
36	401
49	758
52	832
53	171
55	694
55	703
36	401
62	779

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of relator's title. (Murfree, Official Bonds, sec. 320.) The contention between rival appointees and the validity of their claims is for another tribunal. (*Beck v. Jackson*, 43 Mo., 118.) The duty to approve the bond in this case is ministerial. (Murfree, Official Bonds, sec. 320, *supra*; *Beck v. Jackson*, 43 Mo., 118, *supra*.)

C. Hollenbeck, contra:

The appointment of the relator is void. Where a writ of *mandamus* is applied for it will not be awarded to enforce a mere abstract right unattended by any substantial benefit to the petitioner. (*Gormley v. Day*, 28 N. E. Rep. [Ill.], 693; High, Ex. Rem., p. 33, sec. 33, and cases cited.) When a person claims an office and presents his bond for approval he is required to show a *prima facie* title. (*Cope v. State*, 25 N. E. Rep. [Ind.], 866; *Commonwealth v. Common Council, Philadelphia*, 7 Am. Law Reg., 362.)

NORVAL, J.

This is an original application for a peremptory writ of *mandamus* to require the respondent, as county judge of Dodge county, to approve the bond and sureties therein of relator as supervisor of the city of Fremont in said county. The cause is submitted on a general demurrer interposed by the respondent to the petition.

It appears from the application of the relator that the county of Dodge is a county under township organization; that the city of Fremont is a municipal corporation situated within the territorial limits of said county, and having a population of more than 6,000 and less than 10,000 inhabitants; that said city of Fremont was and is, under the statute of this state, a town in said county by the name of said city, and was entitled under the provisions of section 7, chapter 26, Compiled Statutes, to be represented in the county board by two supervisors to be chosen from, and elected by, the legal voters of said city, as such town;

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that at the general election held in November, 1892, W. H. Mead was elected by the electors of said city as one of the two supervisors of the city of Fremont, for the year thence ensuing, to represent said city in said county board; that the said Mead, after having received the notice and certificate of his election as such supervisor, refused to and failed to qualify, and the office thereby became vacant; that on the 21st day of January, 1893, while such vacancy existed, and while no person exercised or claimed the right to perform any of the duties of said office, the relator, a resident and elector of said city, was chosen and appointed by the mayor and council of the city of Fremont as supervisor to fill the vacancy aforesaid caused by the failure of the said Mead to qualify; that thereupon relator duly accepted said appointment, and on the 23d day of January, 1893, duly took and subscribed the oath of office, and executed a bond in due form with sufficient sureties, and on the same day presented the same, with the said oath of office duly indorsed thereon, with his certificate of appointment to said office, to the respondent, as such county judge, for his approval of said bond, and then and there demanded of respondent, as such county judge, the approval of said bond, yet the respondent refused to approve the same, and indorsed thereon his reason therefor, as follows:

"This bond was presented to me for approval this 23d day of January, 1893, and I refused, and refuse to approve this bond and the sureties therein for the reason and upon the ground that the mayor and council of the city of Fremont have no power to appoint or fill the vacancy in the office of supervisor from said city. I hold that such appointment and filling of vacancy are to be done by the county clerk, county treasurer, and county judge. So far as the form and sufficiency of said bond and the sureties therein are concerned I do not question the same, and do not in any degree rest my refusal thereon.

"CLAUS H. PLAMBECK,

"County Judge."

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It further appears from the petition that after relator had taken and subscribed the oath of office and executed with his sureties his bond as aforesaid, the county judge, together with the county treasurer and the county clerk of Dodge county, on January 23, 1893, appointed one Dominick Gannon to fill the said vacancy in said office, who immediately entered upon the discharge of the duties thereof, and refuses to surrender possession of such office to the relator. That relator desires to have his said bond approved in order that he may institute proper suit to test the validity of his title to said office.

It will be observed from the foregoing statement of the case that two persons make claim to the office of supervisor of the city of Fremont; the relator by virtue of an appointment by the mayor and city council of the said city of Fremont, and the said Dominick Gannon, who is exercising the duties of the said office under an appointment made by the county judge, county clerk, and county treasurer of the county of Dodge. There can be no doubt that the claims of the respective parties to the office in question cannot be adjudicated in this proceeding, since it is well established by frequent decisions of this and other courts that the title to an office cannot be tried and determined on an application for a writ of *mandamus*. The proper remedy to try such question is by *quo warranto*. (See *State v. Palmer*, 10 Neb., 203; *State v. Jaynes*, 19 Id., 164; *People v. Goetting*, 30 N. E. Rep. [N. Y.], 968.)

But the object and purpose of this action is not to induct the relator into an office already filled by another; it is to compel the respondent to approve his official bond, a duty imposed upon him by law, thereby to better enable the relator to test his title to the office in a proper proceeding before a competent tribunal, in which the incumbent of the office could be heard in his own behalf. Although the question of strict title to the office in dispute cannot be determined in a collateral proceeding like this, sufficient

investigation may be made to ascertain whether the certificate of appointment held by the relator is *prima facie* evidence of title. If relator makes claim to the office by virtue of color of title, he was entitled to have the respondent approve his bond, the sufficiency of the bond tendered being admitted, since by section 7, chapter 10, Compiled Statutes, it is made the duty of the county judge to approve the official bonds of the supervisors of his county.

Mr. Murfree in his valuable work on Official Bonds, in discussing the question under consideration, at section 320 says: "That the acceptance and approval by the proper county officer of an official bond is held in most of the states to be a ministerial duty, and that in a proper case its performance may be compelled by *mandamus*. In a case of this character, the supreme court of Pennsylvania said: 'Until the title of the relator is avoided it is good against all. He is authorized to enter upon the performance of the duties of the office, and the common council cannot delay him by declining to approve his sureties, if sufficient. A pending contest is nothing to this question. Let a peremptory *mandamus* issue as prayed for.' In this case, it will be observed, the refusal to act upon the bond of the officer was based upon the fact that there was a contested election, the relator being returned as elected, and his competitor claiming the office. The same rule applies, however, in other cases. The officer is entitled to have his bond approved if it is sufficient, and in any case to a decision of the question; the tribunal has only authority to reject it because in their opinion it is insufficient, and not for any other reason."

The contention of the respondent in this case is that he is not required to approve the bond tendered by the relator, for the reason that the appointment of Mr. Truesdell by the mayor and city council of the city of Fremont is void, for the want of power on the part of said city author-

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ities to make it. It is further argued by counsel for respondent that the vacancy in the office of supervisor of said city, occasioned by the failure of Mr. Mead to qualify, could be filled only by appointment made by the county judge, county clerk, and county treasurer. This contention is based upon section 103 of chapter 26 of the Compiled Statutes, which declares as follows:

"Sec. 103. Vacancies shall be filled in the following manner: In the office of the reporter of the supreme court, by the supreme court. In all other state and judicial district offices, and in the membership of any board or commission created by the state, where no other method is specially provided, by the governor. In county and precinct offices, by the county board; and in the membership of such board, by the county clerk, treasury, and judge. In township offices, by the town board, but where the offices of the town board are all vacant the clerk shall appoint, and if there be no town clerk, the county clerk shall appoint. In city and village offices, by the mayor and city council or board of trustees."

Section 5, article IV, of chapter 18, Compiled Statutes, provides the manner in which a county under township organization shall be divided into towns and townships. The last clause of the section declares that no city of over "six thousand inhabitants shall be included within the corporate limits of any township, but the territory occupied by such city of over six thousand inhabitants shall constitute a town by the name of such city for the purpose of town meetings and organization as hereinafter provided."

Section 7 of chapter 26, entitled "Elections," provides, among other things, for the election of supervisors in cities and villages having a population of 1,000 or over in counties under township organization.

Section 103, above quoted, and section 102 of the same chapter, were cited and construed by this court in *State v. Taylor*, 26 Neb., 580. The contest in that case was over

the office of supervisor of "J" township in Seward county. A vacancy having occurred in the office of supervisor of said town, the relator Godard was appointed to fill the same by the county clerk, county judge, and county treasurer of Seward county. The respondent Taylor, at a special town meeting held in said township, was chosen supervisor of said town to fill the said vacancy, and thereafter duly qualified as such. The court decided against Godard's title to the office, holding that a supervisor, in respect to his election and appointment, is a township officer; that the vacancy caused by the resignation of such officer may be filled by appointment by the town board, but where the offices of the town board are all vacant, by the township clerk; and in case the offices of the town board are all vacant, and there is no town clerk, then by the county clerk. It was further held in the same case that there is no authority for filling the vacancy in any township office by the county clerk, county treasurer, and county judge. The writer, as present advised, doubts the soundness of the decision in the case to which reference has just been made, yet, inasmuch as the construction therein placed upon the statute under consideration has been acquiesced in ever since that opinion was handed down, and the rule not having been changed by judicial interpretation or legislative enactment, it must be regarded as the settled law of the state, and is binding upon the courts as a precedent in similar cases.

Counsel for respondent insists that the doctrine in *State v. Taylor, supra*, is not authority on the question now before the court. In that case, as already stated, the relator was appointed by a board consisting of the county clerk, county treasurer, and county judge, while in the case at bar the respondent was appointed by a like board, and the relator herein was chosen by the mayor and city council. The case referred to differs from this in that it was an action to try the title to the office of a supervisor of an ordinary township having a full quota of township officers,

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while here the office in controversy is that of supervisor of a city, a municipal corporation governed and controlled by city officers. We think it can be fairly argued from the rule laid down in said case of *State v. Tylor*, and the sections of the statute mentioned above, that the vacancy in the office of supervisor of the city of Fremont can be properly filled by appointment made by the mayor and council of said city. At least, the appointment of the relator is *prima facie* evidence of title to the office; hence it was the duty of the respondent to have approved the bond of the relator. The statute confers no authority or power upon an officer whose duty it is to approve official bonds to pass upon or decide the validity of the claims to an office under conflicting commissions, nor can such approving officer refuse to approve the official bond presented to him by one claiming the office under color of title, even though the office may at the time be filled or claimed by another. (*Commonwealth v. Common Council, Philadelphia*, 7 Am. Law Reg. [Pa.], 362; *Beck v. Jackson*, 43 Mo., 117.)

The case last cited is squarely in point. That was a proceeding by *mandamus* to require the respondent, as judge of the tenth judicial circuit of the state of Missouri, to approve the bonds of the relator as clerk of the circuit court and recorder for the county of Cape Girardeau. The relator, having been appointed and commissioned by the governor of the state to such office to fill a vacancy occasioned by the death of one Horsten, the previous incumbent, presented his bonds to the respondent and requested the approval thereof, which the latter declined to do, and indorsed thereon that he refused to approve the same for the reason that he had appointed one Harrison to said offices, and already approved his bonds and put him in possession of the offices. The supreme court granted a peremptory writ of *mandamus*. In the opinion the court say: "The commission issued by the governor was at least

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prima facie evidence of title to the office, and if the validity or legality should be disputed, that question can only be determined by a proceeding in the nature of a *quo warranto*, in case Harrison refuses to surrender the office."

The conclusion is irresistible that the petition of the relator herein states a cause of action, and that the demurrer thereto must be overruled.

DEMURRER OVERRULED.

THE other judges concur.

MICHAEL M. SULLIVAN V. E. H. BENEDICT.

FILED MARCH 16, 1893. No. 4933.

1. Appeals from County Court: BOND: FILING TRANSCRIPT.

The law governing appeals from judgments before justices of the peace applies to appeals from the county court to the district court. The party desiring to appeal must file an appeal bond within ten days from the rendition of the judgment, and within thirty days from the date of the judgment he must procure and file in the district court a certified transcript of the proceedings.

2. County Court: APPEARANCE: SETTING ASIDE JUDGMENT:

APPEAL. Where, in an action brought in the county court within the jurisdiction of a justice of the peace, the defendant enters his appearance, but absents himself on the day of trial, he is not entitled to have the judgment against him set aside, under the provisions of section 1001 of the Code, but may prosecute an appeal to the district court.

3. ———: RECORD FOR APPEAL: CONTRADICTION IN APPELLATE

COURT. The record entry of a judgment rendered in the county court, as embodied in a duly authenticated transcript, imports absolute verity, and cannot be varied or contradicted by extrinsic evidence in the appellate court.

ERROR from the district court of Holt county. Tried below before KINKAID, J.

36	409
40	717
36	409
143	236
36	409
50	617

H. M. Utley, for plaintiff in error:

A defendant against whom a judgment is rendered in the county court, by default and in his absence, has the right to appeal after he has applied to have the judgment set aside, under the provisions of sec. 1001 of the Code, and been denied. (*Clendinning v. Crawford*, 7 Neb., 474; *Gudtner v. Kilpatrick*, 14 Id., 347; *Adams v. Thompson*, 18 Id., 543.)

E. H. Benedict, *contra*.

NORVAL, J.

This action originated in the county court of Holt county, and from a judgment in favor of the plaintiff, E. H. Benedict, the defendant Sullivan prosecuted an appeal to the district court, where, on motion of the plaintiff, the appeal was dismissed. The ruling of the district court is now assigned for error.

The appeal was properly dismissed for the reason the same was not taken within the time limited by statute. The judgment was rendered against the defendant by the county court on the 23d day of September, 1889, while the appeal undertaking was not given until the 3d day of November, 1890, and the transcript was not filed in the district court until nine days later; so that more than a year had elapsed after the rendition of the judgment before any steps were taken to obtain a review of the case by appeal. The law governing appeals from judgments before justices of the peace regulates appeals from judgments of the county courts. The appeal undertaking must be given within ten days from the rendition of the judgment, and the appellant must procure and file his transcript of the proceedings in the district court within thirty days after the entry of the judgment. The plain requirements of the statute not having been complied with, the district court did not err in sustaining the appellee's motion to dismiss the appeal.

Plaintiff in error claims that the judgment was rendered in the county court by default, and having applied to have it set aside under section 1001 of the Code, and the application having been denied, he was entitled to an appeal, and that the time for taking and perfecting it did not begin to run until his motion to have the judgment opened up was overruled. The cases of *Clendenning v. Crawford*, 7 Neb., 474, *Gudtner v. Kilpatrick*, 14 Id., 347, and *Adams v. Thompson*, 18 Id., 543, are cited to sustain the proposition contended for. These decisions are to the effect that an appeal does not lie from a judgment rendered by default until after the defendant, against whom the same is entered, has applied to have the judgment set aside under the provisions of the Code, and his application has been denied. The rule cannot be invoked in this case, for the reason that the county court did not render judgment on default and in absence of the defendant. The transcript from the county court shows that on the return day of the summons the "parties appeared, and at the request of the defendant's attorney, cause continued until Monday, September 23, 1889, at 10 o'clock A. M., at costs of defendant, plaintiff consenting thereto." Although the defendant did not appear at the time to which the cause was adjourned, having entered an appearance on the return day of the summons, he was not entitled to have the judgment set aside. He mistook his remedy. He should have appealed. (*Strine v. Kaufman*, 12 Neb., 423; *Raymond v. Strine*, 14 Id., 236; *Steven v. Nebraska & Iowa Ins. Co.*, 29 Id., 187.)

In the district court affidavits were filed by the defendant to the effect that neither he nor his counsel were present in the county court on the return day of the cause, but that three or four days prior thereto, his attorney, Mr. Uttley, and the plaintiff went before the county judge, and at the request of Mr. Uttley, who was then contemplating a trip to Omaha to be absent several days, it was then agreed that when the day arrived on which the trial was set the case

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should be passed until Mr. Uttley should return home, at which time he was to notify the plaintiff and the case was to be tried; that on Mr. Uttley's return from Omaha, on September 28, 1889, he learned that judgment had been rendered against his client and he immediately prepared a motion to set aside the same. These affidavits cannot be considered. It is conceded that the certified transcript made out by the county court is a true copy of the record of the proceedings in the case. The record of the county court, as embodied in a duly authenticated transcript, imports absolute verity and cannot be contradicted in the appellate court by extrinsic evidence. (*Haggerty v. Walker*, 21 Neb., 596; *Worley v. Shong*, 35 Id., 311; *State v. Hopewell*, Id., 822. We discover no error in the record and the judgment of the court below is

AFFIRMED.

THE other judges concur.

JAMES H. DUKEHART V. LETTA COUGHMAN.

FILED MARCH 16, 1893. No. 5917.

1. **Bastardy: EVIDENCE.** In a prosecution for bastardy the guilt of the defendant is not required to be established beyond a reasonable doubt. In such a proceeding a preponderance of the evidence is sufficient.
2. ———: ———. The evidence in the case, although conflicting, is sufficient to support the verdict.
3. ———: ———: **REVIEW.** The rulings of the trial court on the admission of testimony examined and approved.

ERROR from the district court of Gage county. Tried below before BABCOCK, J.

Hardy & Wasson, for plaintiff in error.

36	413
47	834
36	412
62	427a

Griggs, Rinaker & Bibb and A. Hazlett, contra.

NORVAL, J.

This is a proceeding by which it is sought to charge the plaintiff in error with being the father of a bastard child of Letta Coughman. The complaint was filed in the county court of Gage county, the plaintiff in error was arrested, and, after examination before said court, was bound over to the district court. The case was docketed in said court, and the plaintiff in error pleaded that he was not guilty of the charge. There was a trial by jury, and a verdict of guilty. It was thereupon adjudged that he was the father of the said illegitimate child, and that he should pay to the mother for the future maintenance and support of the child the sum of \$50 a year for the period of ten years. From which judgment the defendant below brings the case to this court for review by proceedings in error.

It is strenuously insisted that the verdict of the jury is not sustained by the evidence. The record shows that the prosecutrix is an unmarried woman, and lives with her father and mother; that she became the mother of a child on the 10th day of June, 1892; that at and prior to the time it is alleged the child was begotten, plaintiff in error was a boarder in her father's family. She testified, both in the county court and in the district court, that plaintiff in error had sexual intercourse with her in her father's house in Holmesville on Sunday, the 6th day of September, 1891, while her father and mother were at church; that she only had intercourse with him once, and never had anything to do with any other person. She testified positively that defendant below is the father of her child. Plaintiff in error was examined as a witness in his own behalf, and denied that he was guilty of the act charged. He also attempted to establish an *alibi* by calling several witnesses, who testified that on the 6th day of September,

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1891, the day on which it is alleged the child was begotten, plaintiff in error was in Blue Springs, which is four or five miles distant from Holmesville. On the other hand, testimony was introduced tending to show that Dukehart was at the house of Lettu's father on the above mentioned date. The evidence being conflicting, it was the province of the jury to determine which witnesses should be believed and which disbelieved. If the jury accepted as true the testimony of the prosecutrix and her witnesses rather than that of the witnesses against her, and there being no more reason for rejecting the testimony of the witness on one side than on the other, it cannot be said that the verdict is not sustained by the evidence, or that it was the result of passion and prejudice on the part of the jury. We do not feel at liberty, on the record before us, to hold that the jury were not justified in returning a verdict of guilty. The paternity of the child was not required to be established beyond a reasonable doubt. In an action like this a preponderance of the evidence is sufficient. (*Allschuler v. Algaza*, 16 Neb., 631; *Strickler v. Grass*, 32 Id., 811.)

It is urged that there is no proof that the child was born alive, or was living at the time of the trial. Counsel for plaintiff in error misconceive the force and effect of the testimony of the prosecutrix, as the following quotation from her testimony shows:

Q. 5. Have you ever been married?

A. No, sir.

Q. 6. You may state if you are acquainted with the defendant J. H. Dukehart.

A. Yes, sir.

Q. 7. You may state, Miss Coughman, whether you are the mother of a child.

A. Yes, sir.

Q. 8. State whether or not that child is an illegitimate child—bastard. (Pointing to a child then held in the arms of plaintiff.)

A. Yes, sir.

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Q. 9. You may state, Miss Coughman, who the father of that child is.

A. J. H. Dukehart.

Q. 10. This defendant sitting here?

A. Yes, sir.

Q. 11. When was the child born?

A. June the 10th.

Q. 12. What year?

A. Eighteen hundred and ninety-two.

Q. 13. You may state, Miss Coughman, upon or about what date this child was begotten.

A. The first Sunday in September, as far as I can tell.

Q. 14. This September?

A. Eighteen hundred and ninety-one.

Q. 17. And this child was born in Gage county, Nebraska?

A. Yes, sir.

Q. 18. And begotten in that county?

A. Yes, sir.

Upon cross-examination to the question, "When was it you claim *this* child was begotten?" the witness answered, "Last September, 1891; first Sunday in September, 1891."

The foregoing is the only testimony in the bill of exceptions relating to the birth of the child, and we think was ample proof that the child in question was not only born alive, but was living at the time of the trial.

Complaint is made because the prosecutrix was not permitted to answer three certain questions propounded to her on cross-examination. The first one had reference to the size of plaintiff in error, the question being, "he is a pretty small man." It was objected to, as immaterial, irrelevant, and incompetent, but the court did not make a ruling thereon. We are unable to see the materiality of the inquiry; besides, Dukehart was in the court room during the trial, and at the request of his counsel he and the prosecutrix stood up together before the jury, so that

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they had the opportunity of comparing the sizes of the two. The other questions asked the prosecutrix were objectional, and the court did not err in not permitting them to be answered.

It is claimed that the court erred in sustaining the objections of the plaintiff below to each of the following questions submitted to the witness John Culver, who was sworn for the plaintiff in error:

Q. 334. I will ask you if you remember writing Mr. Dukehart a letter on the 4th of September, 1891, requesting him to meet you in Blue Springs on Sunday, the 6th of September, 1891?

(Objected to, as immaterial, irrelevant, and incompetent. Sustained. Exception.)

Q. 335. Did you write him a letter at that time?

(Objected to, as immaterial, irrelevant, and incompetent. Sustained. Exception.)

The record fails to disclose the relevancy of the testimony sought to be elicited by these interrogatories; besides, error cannot be predicated upon the sustaining of the objections for the reason counsel for plaintiff in error made no statement to the trial court of what he expected to prove by the witness. (*Masters v. Marsh*, 19 Neb., 458; *Mathews v. State*, 19 Id., 330; *Yates v. Kinney*, 25 Id., 120; *Burns v. City of Fairmont*, 28 Id., 866.) No reversible error having been pointed out in the record the judgment of the district court is

AFFIRMED.

THE other judges concur.

FREDERICK K. BABCOCK V. CAROLINE A. PURCUPILE.

36	417
48	126
36	417
58	497

FILED MARCH 16, 1893. No. 4720.

1. **Contract: SALE: RESCISSION.** *Held*, That the defendant was not entitled to rescind the contract, and that plaintiff was entitled to recover the unpaid purchase price of the eggs.
2. ———: ———: ———: **REVIEW: HARMLESS ERROR.** *Held*, That the giving of the instructions, set out at length in the opinion, is not reversible error, since the verdict of the jury is the only one which should have been returned under the testimony.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

Wharton & Baird, for plaintiff in error.

V. O. Strickler, *contra*.

NORVAL, J.

This action was brought by defendant in error to recover the value of eleven cases of eggs, sold and delivered by her to plaintiff in error. There was a trial to a jury, who returned a verdict in favor of the plaintiff below for the sum of \$41.37, and for which amount judgment was rendered.

In 1888, defendant in error was engaged in the general merchandise business at Auburn, this state, the business being conducted by her husband, J. C. Purcupile. During the same time plaintiff in error was engaged in the grocery business in the city of Omaha. Prior to December 18 of that year, Mrs. Purcupile had sent Mr. Babcock several consignments of butter and eggs, on account of which he owed her a balance amounting to \$31.65. On said date she also sold and delivered to him eleven cases of eggs, to

recover the purchase price of which this action was brought. Mr. Babcock admits the purchase and delivery of the eggs, but he insists, and the testimony on his behalf tends to show, that he bought them upon the expressed condition that the plaintiff would permit him to apply as a credit the said sum of \$31.65, due her upon former shipments, on an account for groceries which had been previously contracted by J. H. Purcupile, a brother-in-law of the defendant in error, and that in pursuance of said agreement he so applied the money; that subsequently defendant in error objected to such application, and thereupon Mr. Babcock shipped by express to her address, at Auburn, six cases of the eggs, the other five cases having been previously disposed of. It is undisputed that prior to the bringing of the action plaintiff in error paid Mrs. Purcupile the above mentioned sum of \$31.65, and also for the five cases of eggs which he had sold; but that he has failed and refused to pay for the other six cases. The evidence fails to show that defendant in error ever received the six cases in question. The testimony introduced by plaintiff in error to the effect that the eggs were purchased upon condition that the above mentioned sum should be credited to J. H. Purcupile's account was contradicted by other testimony on behalf of the defendant in error. J. C. Purcupile, the husband of Caroline A., and who made the sale for her, and his father Archibald, who was also present at the time the sale was made, each testified that the eggs were purchased unconditionally; that Mr. Babcock at the time asked that the balance due from him to plaintiff below on former shipments be applied on the account of J. H. Purcupile, and that such request was refused.

At the trial exceptions were taken to the giving of the third, fourth, and sixth paragraphs of the court's charge to the jury, and the principal grounds upon which we are asked to reverse the judgment are based upon said instructions. The instructions complained of are as follows:

"3. Even though you should find from the testimony that the eggs were purchased by the defendant upon the condition claimed by him, it was his duty, if he desired to rescind the contract by reason of the refusal of the plaintiff to comply with the condition, to return or offer to return the eggs, which he claimed were so conditionally purchased, to the plaintiff, and if, having disposed of a substantial part of such purchase, he had placed it beyond his power to return the eggs purchased under such condition, it is not in the power of the defendant to rescind the contract in part and to take the benefit of it in part. The return of a portion of the eggs therefore by the defendant to the plaintiff without the consent of the plaintiff did not relieve the defendant from liability for the purchase price of the eggs sold and delivered to the defendant.

"4. If, at the time of the purchase of the eleven cases of eggs by the defendant, it was agreed as part of the transaction that the amount due upon former shipments by the plaintiff to the defendant should be credited upon the amount due from J. H. Purcupile to the defendant, and that was done as claimed by the defendant, such agreement and credit became a closed transaction, and any demand subsequently made by the plaintiff from the defendant for payment of such old account would not justify the defendant in rescinding the contract of purchase of the eleven cases of eggs, especially after the plaintiff had disposed of a substantial part of such purchase; but in such case the remedy of the defendant was to insist upon the agreement, and refuse payment of such old account, which had been already paid by the credit upon the account of J. H. Purcupile, as claimed by the defendant.

"6. The fact that the defendant shipped six cases of the eggs to the plaintiff at Auburn, Nebraska, would not relieve defendant from his liability to pay for the same in the absence of proof that the eggs so shipped were accepted by the plaintiff, or that the defendant had the right to rescind

Babcock v. Purcupile.

his contract of purchase, and if he undertook so to rescind, it was his duty to place the plaintiff in *statu quo* by returning all the eggs included in his purchase."

Counsel for defendant below concede that the general rule requires a party desiring to rescind a contract to place the other party in *statu quo*, but insist that the rule is not absolute; that in the case at bar Babcock was required only to do what he could to place the plaintiff in the same position; that having sold a part of the eggs and paid the seller for the same, the buyer, in order to rescind, was only required to return the eggs unsold; hence the instructions were erroneous. In the view we take of the case we do not deem it important to decide whether the charge of the court correctly laid down the law relating to the rescission of a sale of personal property, for it is to us plain that that there is no legal ground, either alleged or proved, for the rescission of the purchase in the case under consideration. In the first place, the defendant was not induced to enter into the contract under a mistake of fact, or through the false or fraudulent representations of the plaintiff as to an existing fact. All that is claimed is that the latter agreed that the former might apply the sum due on prior purchases on the indebtedness of J. H. Purcupile, and that plaintiff subsequently objected to such credit being made. Such refusal was not a sufficient excuse for rescinding the contract. If the eggs were bought upon the condition claimed by the defendant, he could have credited the brother-in-law's account with the amount due plaintiff on former consignments, and she could not have collected the same. But he voluntarily paid the money to plaintiff, which constituted a modification of the contract, and defendant is bound by the contract thus modified.

Again, the defendant is not entitled to a rescission for the reason that he did not return, nor offer to return, the eggs at the place where he received them. They were delivered to him in Omaha, while he sought to rescind by shipping a

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portion of the eggs to plaintiff at Auburn several weeks after the purchase. We think upon the record before us the jury would not have been justified in returning a different verdict; hence defendant was not prejudiced by the instructions above mentioned. The judgment of the court below is

AFFIRMED.

THE other judges concur.

**JOHN H. VON STEEN ET AL., APPELLEES, V. CITY OF
BEATRICE, APPELLANT.**

FILED MARCH 16, 1893. No. 5857.

1. **Municipal Corporations: STATUTES: REPEAL BY IMPLICATION.** The act of March 30, 1887, entitled "An act to amend sections 27 and 58, and to add subdivisions 58 and 59 to section 52, article 2, chapter 14, Compiled Statutes, relating to cities of the second class having over 5,000 inhabitants," etc., is a complete act covering the entire subject of the power of the class of cities designated with respect to the opening and improving of streets and alleys, and by implication repeals all prior acts in conflict therewith.
2. ———: ———: ———. The provision of subdivision 4 of section 52, article 2, chapter 14, Compiled Statutes, for the paving of streets in cities of the second class having over 5,000 and less than 25,000 inhabitants, without petition of the owners of property to be charged therefor, is in conflict with the provisions of the act of March 30, 1887, and is repealed thereby.
3. ———: **PAVING STREETS: SPECIAL ASSESSMENTS: PUBLIC PROPERTY.** The property of the state, counties, or school districts is not liable for special assessments for paving or otherwise improving the streets of cities of the second class having over 5,000 and less than 25,000 inhabitants.
4. ———: ———: **A PETITION TO CONFEE JURISDICTION** upon the city council to order the paving of streets in any paving dis-

36	421
37	536
38	421
41	361
41	601
36	431
53	167
55	63
55	68
36	421
60	126
36	421
61	269

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trict of cities having over 5,000 and less than 25,000 inhabitants must be signed unconditionally by the owners of the majority of the feet fronting thereon.

APPEAL from the district court of Gage county. Heard below before BABCOCK, J.

W. C. Le Hane, L. M. Pemberton, and Griggs, Rinaker & Bibb, for appellant.

E. R. Fogg and E. O. Kretsinger, contra.

POST, J.

This is an appeal from a decree of the district court of Gage county, enjoining the defendant, the city of Beatrice, from concluding a contract for the grading, paving and guttering of the streets in paving districts numbers 9 and 10 in said city. The pleadings are too voluminous to be set out in this opinion, but the contentions of the parties will be understood from the following statements: Ordinances were passed by the city council creating the aforesaid districts pursuant to petitions of property owners therein, and bonds voted to defray the cost of paving intersections of the streets and the parts thereof opposite alleys, and the city was about to let contracts for such improvements when restrained by an order of the district court. It is claimed by the plaintiffs that said ordinances are void and insufficient to authorize the paving of the streets in either district for the reason that the petitions therefor were not signed by the requisite number of property owners in said districts, or either of them, to confer upon the city council jurisdiction to act in the premises. It is argued, however, by counsel for the city that no petition is necessary in order to give the city council jurisdiction in cases where three-fourths of all the members thereof shall vote in favor of an ordinance for the paving or otherwise improving of the streets of the city. It is admitted that Beatrice is a city of

the second class of over 5,000 inhabitants and governed by the provisions of article 2, chapter 14, Compiled Statutes. The provision thereof upon which the contention of the city is based is subdivision 4 of section 52, as follows: "In addition to the powers heretofore granted cities under the provisions of this chapter, each city may enact ordinances or by-laws for the following purposes: To construct sidewalks, sewers, and drains; to curb, pave, gravel, macadamize and gutter any highway or alley therein, and to levy a special tax on the lots and parcels of land fronting on such highway or alley, to pay the expense of such improvement. But unless a majority of the resident owners of the property subject to assessment for such improvement petition the council to make the same, such improvement shall not be made until three-fourths of all the members of such council shall, by vote, assent to the making of the same."

Article 2 was first enacted in 1883, and entitled "An act to provide for the organization, government, and powers of cities of the second class having more than ten thousand inhabitants." (Laws of 1883, p. 130.) By an act approved March 5, 1885, the title of said act was amended so as to include within its provisions cities of the second class of over 5,000 inhabitants. March 30, 1887, an act was approved entitled "An act to amend sections 27 and 58, and to add subdivisions 58 and 59 to section 52, article 2, of chapter 14, Compiled Statutes, relating to cities of the second class having over 5,000 inhabitants and to repeal said original sections 27 and 58, and all acts and parts of acts in conflict with this act." Section 2 of the act last named provides "That section 52 of article 2 of chapter 14 of the Compiled Statutes * * * be amended by adding thereto the following subdivisions 58 and 59."

By subdivision 58 it is provided that "the city council shall have power to open, extend, widen, narrow, grade,

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curb, gutter, and pave, or otherwise improve and keep in good repair, or cause the same to be done in any manner they may deem proper, any street, avenue, or alley within the limits of the city. * * * The mayor and council of such city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to, or abutting upon, the street, avenue, alley, or sidewalk thus in whole or part opened, widened, curbed, guttered, graded, parked, extended, constructed, or otherwise improved, or repaired, or which may be specially benefited by any of said improvements."

The foregoing is followed by seventeen provisos, covering sixteen pages of the Session Laws, from which it appears that the legislature had in contemplation all kinds of improvements to the streets of the city, as well as the manner of making assessments to defray the cost thereof, and intended the provisions therein to be exclusive. In fact, so far as it relates to the power of the city with respect to streets, alleys, and parks the act of 1887 covers the entire subject, and must be regarded as the charter of the city, and by implication repeals all prior acts in conflict therewith. (*State v. Benton*, 33 Neb., 823.) The fifth proviso of the act under consideration is as follows:

"Provided further, That curbing and guttering shall not be ordered or required to be laid on any street, avenue, or alley not ordered to be paved, except on the petition of a majority of the owners of the property abutting along the line of that portion of the street, avenue, or alley to be curbed and guttered. The mayor and council of any city governed by this act shall have power to pave, repave, or macadam any street or alley, or part thereof, in any city, and for that purpose to create suitable paving districts, which shall be consecutively numbered, such work to be done under contract and under the superintendence of the board of public works of the city; whenever the owners of lots or lands abutting upon the streets, or alleys, within

any paving district representing a majority of feet front thereon, shall petition the council to pave, repave, or macadam such streets or alleys, it shall be the duty of the mayor and council to pave, repave, or macadam the same, and in all cases of paving, repaving, and macadamizing, there shall be used such material as such majority of owners shall determine upon."

By the provision last quoted power is conferred upon the mayor and city council to pave, repave, or macadam streets and alleys in any district whenever the owners of lots or lands representing a majority of the feet fronting thereon shall petition therefor and not otherwise. By no reasonable or natural construction can said provision be reconciled with the one first cited, viz., subdivision 4 of section 52 of the original charter of the city, by which the council is authorized to pave the streets of any district without a petition therefor. The two provisions being irreconcilable, the act of 1887, being the later expression of the legislative will, must prevail.

2. The total frontage in district No. 9 is, according to the record, 3,280 feet and the petition purports to have been signed by the owners of 1,855 feet thereof. It is contended that the following names and descriptions of property were illegally counted on the petition:

"Alex. Graham, chairman county board, south half of lot 11, block 24, 440 feet.

"Rt. Rev. Thos. Bonacum, per Rev. A. J. Capellen, lots 11, 12, 13, and 14, block 7, 200 feet.

"Beatrice school district, by G. C. Saulsbury, president, block 21, 300 feet.

"J. E. Hays, lot 3, block 10, 60 feet.

"First Christian church, by John Ellis, chairman of trustees, lot 7, in block 35, 140 feet.

"Charles H. Spencer, lots 5, 6, 7, 8, and 9, block 25, 125 feet.

"John A. Moor, per J. A. Forbes, agent, lot 8, block 7, 70 feet.

"Richard Lowe, lot 6, block 22, 140 feet."

It will be observed that of the frontage represented by the petition, 440 feet is the property of Gage county, and 300 feet belongs to the school district of Beatrice. The question whether public property of like character, viz., the county court house and grounds, and the city school house and grounds, is liable for special assessments for public improvements, as in the case for the paving of streets adjacent thereto, has never been presented to the courts of this state. We find in the decisions upon the subject an irreconcilable conflict of opinion. It is provided by section 2 of our revenue law, ch. 77, Comp. Stats., that "The following property shall be exempt from taxation in this state: *First*—The property of the state, counties, and municipal corporations, both real and personal. *Second*—Such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes." Similar provisions have been construed as exempting the property mentioned therein from all contributions in the nature of taxation whether imposed for public purposes under the general revenue laws, or for local improvements such as are denominated special assessments. Opposing this view is the doctrine quite as well sustained by authority, that the immunity from taxation relates only to general, state, county, or other municipal taxes and not to assessments for improvements made under special laws or ordinances and local in their character.

It is not deemed necessary to review the cases cited in support of the different views by their respective advocates, since the solution of the question here presented depends upon a construction of the charter of the defendant city.

In subdivision 58 of section 52 of article 2, ch. 14, Comp. Stats., as amended in 1887, we find the following

language: "If in any city governed by this act there shall be any real estate not subject to assessment or special taxes for paving purposes, the mayor and council shall have the power to pave in front of the same and to pay the cost thereof that would otherwise be chargeable on such real estate in the same manner as herein provided for the paving of intersections of streets and paying therefor." The same provision is found in the acts for the incorporation and government of cities of the first class having over 25,000 inhabitants and of metropolitan cities. (Sec. 69, ch. 12a, and sec. 69, ch. 13a, Comp. Stats.) The meaning of the language quoted becomes apparent only when we assume that in the opinion of the legislature public property like that here involved is not liable to assessment for the improving of the streets under the ordinances of the city. It seems clear to us that the language, "real estate not subject to assessment or special taxes for paving purposes," has reference to the property enumerated in section 2 of the revenue law, for so far as we are aware no claim of exemption has been made in favor of any other property. We are confirmed in this view from an examination of the act of March 14, 1889, entitled "An act to incorporate cities of the first class having more than eight thousand and less than twenty-five thousand inhabitants, and regulating their powers, duties, and government." The last named act, so far as it relates to improvements of streets and alleys, appears to be a substantial copy of the charter of the defendant city, viz., the act of 1887. But instead of the provision above quoted from the act of 1887 we find the following:

"Provided, further, That if in any city governed by the provisions of this act there shall be any real estate belonging to any county, school district, or other municipal or quasi-municipal corporation abutting upon the street whereon paving or other special improvements have been ordered, it shall be the duty of the board of county com-

Von Steen v. City of Beatrice.

missioners, board of education, or other proper officers, to pay such special taxes; and, in the event of the neglect or refusal of such board or other officers to levy and collect the taxes necessary to pay for such improvements, the city may recover the amount of such special taxes in a proper action, and the judgment thus obtained may be enforced in the same manner as other judgments against municipal corporations."

The foregoing is the only express provision within our knowledge in any of the acts for the government of cities of the second class imposing upon the state, counties, or other municipalities a liability for special assessments. It is not the policy of the law to empower cities in this state to expend public funds for improvements where no liability exists therefor.

When we consider the several provisions for the payment by cities for paving streets adjacent to property not liable for special taxes in connection with the exception above noted, the only reasonable construction thereof is that the exemption from taxation in the revenue law in favor of state, county, and school district property was intended to apply to and include assessments like that involved in this controversy. Although it is probable the property of the Catholic church is entitled to exemption upon the same ground as that of the county and school district, the argument for its rejection is rather on the ground of want of authority of the Rev. Cappellen to sign in behalf of the bishop of Lincoln, who holds the title thereto. In view of the conclusion already stated we have no occasion to consider that question, for when we deduct 440 feet on account of property of the county, and 300 feet for the school district, it is evident that the petition was insufficient to confer jurisdiction upon the city council, and that the ordinance creating district No. 9, and all acts in pursuance thereof, are void.

3. The total frontage in district No. 10 is 5,153 feet.

The number of feet represented on the petition is 2,720 $\frac{3}{4}$, of which it is claimed the following are illegal and should have been rejected: G. I. Piper, 50 feet, and J. E. Hill, 136 $\frac{3}{4}$ feet, "on condition that grade is satisfactory and trees are not molested."

We agree with the district court that the petition to confer upon the council jurisdiction must be unconditional, and that no argument is required to prove that the signatures of Hill and Piper, with the property represented by them, should have been rejected.

4. It is also argued that the signature of Geo. R. Scott, representing sixty-five feet, should have been rejected on the ground that the real estate described is the property of his wife and that the signature of Jas. B. Buchanan, representing fifty feet, should have been rejected for the same reason.

It appears from the evidence that the parties named occupy the property signed for as their respective homesteads, the title thereof being in their wives. It appears that each was authorized to sign the petition in the name of his wife. By the charter of the city the council thereof is authorized to pave at the expense of property owners upon certain express conditions only, among which is a petition by *the owners* of the majority of the feet fronting, etc. The office of the petition is to authorize the council to subject private property to unusual burdens, and it is the right of every taxpayer of the district to demand a compliance with all conditions essential to give the city jurisdiction to exact from him unusual sums as special taxes. It cannot be said that Mrs. Scott and Mrs. Buchanan ever petitioned for the paving of district No. 10. The fact that they are now willing to ratify the acts of their husbands will not bind the objecting property owners. The petition cannot be likened to a simple contract so as to permit one contracting party to prove that the other was acting for an undisclosed principal. It is more analogous to a contract under seal

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wherein the covenants can be enforced only against the covenantor. (See *Taft v. Brewster*, 9 Johns. [N. Y.], 334; *Stone v. Wood*, 7 Cow. [N. Y.], 453; *Guyon v. Lewis*, 7 Wend. [N. Y.], 26; *Briggs v. Partridge*, 64 N. Y., 357; *Kiersted v. Orange & A. R. R. Co.*, 69 Id., 343; *Mussey v. Scott*, 7 Cush. [Mass.], 126; *Sheldon v. Dunlap*, 16 N. J. L., 245; *Mecham, Agency*, 702, and cases cited.) It follows that the signatures of Scott and Buchanan, with the property represented by them on the petition, 115 feet, should also have been rejected, making a total, illegally counted, of 301½ feet, which deducted from the amount represented on the petition leaves 2,419 feet or less than a majority. The judgment of the court perpetually enjoining the letting of the contract is right and is

AFFIRMED.

THE other judges concur.

36	430
41	691
36	430
48	498
36	430
45	631
36	430
54	14
54	337
36	430
59	89
36	430
61	173

LEVI G. TODD, GUARDIAN, APPELLANT, V. ISAIAH L. CREMER ET AL., APPELLEES.

FILED MARCH 16, 1893. No. 4623.

- 1. Assignments to Different Persons of Several Notes Secured by Single Mortgage: FORECLOSURE: DISTRIBUTION OF PROCEEDS.** Where several notes, secured by one mortgage, are transferred to different parties, such transfer amounts to an assignment *pro tanto* of the mortgage, and the several holders thereof will be entitled to share *pro rata* in the proceeds of the mortgaged property.
- 2. ———: ———: PARTIES: RES ADJUDICATA.** A decree of foreclosure, to which the holders of the other notes secured by the same mortgage is not made a party, is not a bar to a subsequent foreclosure proceeding by the holder of such notes.

APPEAL from the district court of Cass county. Heard below before CHAPMAN, J.

Edwin F. Warren, J. C. Watson, and G. S. Polk, for appellant.

A. N. Sullivan, contra.

Post, J.

This is an appeal from a decree of the district court of Cass county. The cause of action stated in the petition is substantially as follows: On the 9th day of February, 1885, two of the defendants, Sullivan and McLaughlin, sold to the defendant Cremer the east half of the southwest quarter of section 12, township 10, range 9 east, in Cass county, and as representing the consideration therefor, Cremer executed to them his six promissory notes, secured by mortgage upon the real estate above named, which was duly filed for record; one of said notes is for \$500, maturing March 1, 1886, the others are for \$300 each, and maturing March 1, 1887, March 1, 1888, March 1, 1889, March 1, 1890, and March 1, 1891; that the two notes last described were, before maturity thereof, transferred by said Sullivan and McLaughlin to plaintiff, and indorsed without recourse, and that said notes were received by the plaintiff as guardian of Thomas Lindsey, an insane person; that prior to February 10, 1888, said Sullivan and McLaughlin indorsed and transferred three of said notes, to-wit, those maturing March 1, 1887, March 1, 1888, and March 1, 1889, to the defendants, Geo. E. Dovey, Oliver Dovey, Horatio Dovey, and Mrs. E. G. Dovey, doing business in the firm name of E. G. Dovey & Son, who, on said 10th day of February, 1888, filed a petition in the district court of Cass county, in their firm name of E. G. Dovey & Son, for the foreclosure of the mortgage aforesaid; that neither plaintiff, nor his said ward, were

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made parties to said foreclosure proceeding; that at the April term, 1888, Cremer having made default, a decree of foreclosure was entered in favor of the plaintiffs therein for the sum of \$915 and costs; that on the expiration of a stay of execution allowed on the application of Cremer, an order of sale was issued on said decree, by virtue of which the mortgaged property was sold to said E. G. Dovey & Son for the sum of \$850, which sale was subsequently confirmed and a deed executed and delivered in pursuance of said order. It is further alleged, that at the time of the foreclosure sale there was of record two mortgages, which were apparent liens upon said premises, to-wit, one in favor of the Phoenix Mutual Life Insurance Company for \$350, and one in favor of Joseph Weckbach for \$900, both executed by remote grantors of Sullivan and McLaughlin, but which had both been paid and satisfied in full, as the last named defendants well knew; but that said defendants, conspiring with the defendants Dovey, to defraud the plaintiff and his ward, procured the said mortgages to be deducted from the value of said land as prior liens, by reason of which it was sold for the nominal sum of \$850, when it was in fact worth quite \$3,000. It is also alleged that the said decree of foreclosure is void as to the plaintiff, by reason of the fraud alleged, and for the further reason that he was a necessary party thereto, and that it casts a cloud upon the title of the premises to his damage, and for which he has no adequate remedy at law. The prayer is for a vacation of the decree of foreclosure and sheriff's sale, and for an accounting and foreclosure of the mortgage, and for general equitable relief.

The defendants, except Cremer, who made default, join in an answer which need not be examined, but which puts in issue all of the allegations of fraud and conspiracy.

On the hearing, the district court, in addition to a general finding for the defendants, found the following facts:

"1st. That the allegations of fraud and conspiracy made against the defendants is not sustained by the evidence, and that the evidence shows that there was no conspiracy entered into to defraud the plaintiff and his ward.

"2d. That defendants did not take any undue advantage of the plaintiff and his ward in the sale of the east half (E. $\frac{1}{2}$) of the southwest quarter, or (S. W. $\frac{1}{4}$), of section twelve (12), township ten (10) north, range nine (9), in Cass county, Nebraska.

"3d. That said east half (E. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section twelve, township ten (10) north, range nine (9), in Cass county, Nebraska, is worth the sum of \$3,000, and that plaintiff and his ward, not having been made a party defendant in the foreclosure action of E. G. Dovey & Son v. Isaiah L. Cremer, have lost no rights by reason of said action, and that said mortgaged premises are ample security for plaintiff's said demand."

We are not called upon to review the findings of the district court for the reason that the allegations of fraud are wholly irrelevant to the real issue in the case. It is manifest that plaintiff is not concluded by the decree of foreclosure and that he is entitled to share *pro rata* with the holders of the several notes secured by the mortgage. (*Studebaker Mfg. Co. v. McCargur*, 20 Neb., 500.) It also appears from the allegations of the petition that the mortgaged property is ample security for the notes held by plaintiff.

2. We think the plaintiff is entitled to an accounting and foreclosure of the mortgage, and that the decree should be modified in that respect. The petition contains all of the allegations necessary to entitle him to that relief while the necessary parties are all before the court. We are disposed to regard the action as a foreclosure proceeding rather than as one for the purpose of relief on the ground of fraud. The cause will therefore be remanded with directions to the district court to allow an accounting between the parties

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and a decree of foreclosure of the mortgage described in the record. In other respects the decree is affirmed.

MODIFIED AND AFFIRMED.

THE other judges concur.

ELI BROWN V. FARMERS & MERCHANTS BANKING
COMPANY.

FILED MARCH 16, 1893. No. 4577.

1. **Voluntary Assignment: FRAUDULENT CONVEYANCE OF CHATTELS BY ASSIGNOR: REPLEVIN BY ASSIGNEE.** The fact that a chattel mortgage was executed a few hours previous to the making of a voluntary assignment by the mortgagor for the benefit of creditors is not conclusive evidence of fraud so as to entitle the assignee to recover the mortgaged property as a part of the assigned estate.
2. ———: ———: ———: **RIGHTS AND AUTHORITY OF ASSIGNEE.** Under the provisions of sections 42 and 43 of the assignment law, the rights of the assignee to recover property fraudulently transferred by the assignor are similar to those of a judgment creditor and must be enforced according to the forms of law. He is not authorized to forcibly seize and take property on the assumption that it was transferred by his assignor in fraud of the rights of creditors.
3. **Review: EVIDENCE.** *Held*, That the judgment of the district court is warranted by the findings of the referee.

ERROR from the district court of Franklin county. Tried below before GASLIN, J.

J. L. Kaley and A. F. Moore, for plaintiff in error.

Case & McNeny, contra.

Post, J.

This was an action of replevin in the district court of Franklin county by the defendant in error against the plaintiff in error, defendant below, Eli Brown, sheriff of said county. The subject of the controversy is a stock of merchandise and fixtures claimed by the plaintiff below by virtue of a chattel mortgage executed by one Elder, while the defendant below claims under a general assignment executed to him as sheriff by said Elder. The issues having been made up, the case was by agreement sent to a referee for trial, with instructions to find the facts and state his conclusions of law. On the coming in of the report, judgment was entered thereon in accordance with the recommendation of the referee. The only question presented by the record in this court is whether the defendant in error is entitled to judgment upon the findings of the referee, which are here set out.

"1. That on July 9, 1888, the plaintiff, The Farmers & Merchants Banking Company, discounted a note of \$1,000, signed by S. S. Elder, John W. Elder, and A. M. Williams & Co.

"2. That on October 1, 1888, the said S. S. Elder made a chattel mortgage on the goods in question to the plaintiff, which said chattel mortgage was recorded October 2, 1888, at 9 o'clock in the forenoon of said day and was accepted by the said plaintiff, and that afternoon the said plaintiff, at about 1 o'clock P. M. of said day, took possession of said goods.

"3. That on the 2d day of October, A. D. 1888, the said S. S. Elder made to the sheriff of Franklin county a general assignment for the benefit of all his creditors, which assignment was recorded on the 2d day of October, 1888, at 9 o'clock and 30 minutes A. M.

"4. That the plaintiff first heard of the assignment between 3 and 4 o'clock P. M. of October 2, 1888, after the plaintiff had accepted of the mortgage.

"5. That on the 8th day of October, 1888, the defendant, as assignee of S. S. Elder, took possession of the goods in question under said assignment and continued to hold the same until replevied in this suit."

Under the above state of facts the referee finds, as conclusions of law and fact:

"1. That the mortgage made on October 1, 1888, was made in good faith to secure a valid and *bona fide* indebtedness from the said S. S. Elder, John W. Elder, and A. M. Williams to the plaintiff.

"2. That said mortgage created a lien upon said property in question from the time of its execution and delivery in favor of the said plaintiff.

"3. That at the time when the said defendant took possession of said property, on the 8th of October, A. D. 1888, the said plaintiff had a prior lien upon the same.

"4. That at the time of the commencement of that suit the plaintiff, The Farmers & Merchants Banking Company had a qualified ownership in said property to the amount of their said note and mortgage, and was entitled to the immediate possession thereof, and that the same was unlawfully detained by the defendant."

The ground on which the mortgage is assailed by the sheriff as assignee is that it is void under the provisions of the assignment law.

The findings of the referee are quite indefinite. For instance, it does not appear, except by inference, that the mortgage upon which the defendant in error relies was given to secure the \$1,000 note mentioned in finding No. 1, nor is the date of said note apparent, or the time when the indebtedness represented thereby was created. On the other hand, it is not found that the mortgagor, Elder, was insolvent on the 2d day of October, 1888, or contemplating insolvency, or that the defendant in error had reasonable cause to believe him to be insolvent or contemplating insolvency.

This is not an action in which the assignment is assailed on the ground that the execution of the mortgage a few hours prior thereto amounts to a preference of the bank as a creditor within the meaning of the assignment law. The contention is between the bank, defendant in error, and the assignee. It is provided by section 42 of the assignment law that "If a person, being insolvent or in contemplation of insolvency, within thirty days before the making of any assignment, makes a sale, assignment, transfer, or other conveyance of any description, of any part of his property to a person who then has reasonable cause to believe him insolvent or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee, * * * or to evade any of said provisions, the sale, assignment, transfer, or conveyance shall be void and the assignee may recover the property or the assets of the insolvent." It cannot be inferred from the report of the referee that the mortgage in question was executed in violation of any of the provisions of the section quoted. But assuming that it was fraudulent, that is, executed with an intention on the part of the mortgagor, Elder, to prefer the bank, and that the latter, by its managing officers, actively participated in such fraud, it does not follow that the assignee was entitled to possession of the property at the time of the commencement of the action in the district court. The defendant in error was in possession under the mortgage when the assignment was executed, and its possession of the property was continuous until it was taken by the assignee October 8.

In *Housel v. Cremer*, 13 Neb., 298, it was held that the assignee under a voluntary assignment cannot be permitted to urge that a sale of the property by his assignor previous to the assignment was fraudulent as to creditors of the latter, on the ground that a fraudulent conveyance is good as against the parties thereto and their representatives, and

Brown v. Farmers & Merchants Banking Co.

that the rights of the assignee, with respect to the assigned estate, are simply those of the assignor at the time of the assignment. That was a case under the assignment law of 1877, and is intended as a statement of the rule applicable to common law assignments. The proposition that the assignee represents the assignor only would not be strictly accurate as applied to the assignment law of 1883. It would seem that by the provisions of section 42, above set out, the assignee may, in his discretion, proceed to recover property which rightfully belongs to the estate, but which has been diverted therefrom by the fraudulent act of his assignor. The authority conferred by the section named, as well as by section 43, is to recover the property according to the forms of law. His rights and remedies are similar to those of a judgment creditor, and he is not authorized to take by force property conveyed or transferred by the assignor wherever found in the possession of the purchaser.

It is due to counsel to say that the question to which most prominence is given in the brief of plaintiff in error, is the sufficiency of the evidence to sustain the findings. It is argued that the proofs clearly show that the mortgage was given by Elder for the purpose of defrauding creditors, which purpose was known to the officers of the bank, and which fact was available to Brown, the assignee, as a defense in the action against him on his bond. But the alleged bill of exceptions was stricken from the record on motion of defendant in error, for the reason that it was not allowed or signed by the referee. Our inquiry is restricted to the one proposition, viz., whether the court has correctly applied the law to the facts found by the referee. That question, as already intimated, should be resolved in favor of the judgment of the district court.

AFFIRMED.

THE other judges concur.

ANDREW J. HALE V. MICHAEL SHEEHAN.

36 439
61 816

FILED MARCH 16, 1893. No. 4943.

1. **Master and Servant: CONTRACT: DISCHARGE OF EMPLOYE:**
ACTION FOR DAMAGES: ALLEGATIONS AND PROOF. In an action for wrongful discharge before the termination of his employment, the plaintiff must show that he is ready and willing to complete his contract.
2. ———: ———: ———: ———: ———. S. contracted for the service of himself and son for a given time at the rate of \$50 per month. He alone went into the service of H., his employer, and was subsequently discharged before the termination of the period named in the contract. It does not appear that he ever tendered the services of his son, or that the latter was ready or willing to enter the employment of H. *Held*, That the discharge of S. was not a breach of the contract for which he could recover in an action for being wrongfully discharged, although he may recover in a proper action for the value of his services.

ERROR from the district court of Gage county. Tried below before BROADY, J.

A. Hardy, for plaintiff in error.

George A. Murphy and Rickards & Prout, contra.

POST, J.

This case comes into this court by petition in error from the district court of Gage county. The petition below contains two causes of action, the first of which is as follows:

"1st. That defendant Andrew J. Hale is indebted to plaintiff in the sum of \$383.63, with interest thereon at the rate of seven per cent per annum from the first day of December, 1887, as a balance of money due and unpaid on a certain contract executed by plaintiff and defendant for the hire of plaintiff, for the performance of work and labor

Hale v. Sheehan.

by plaintiff for defendant, on defendant's Sicily Creek farm, in Gage county, Nebraska, and for boarding the farm hands of defendant by plaintiff, and for failure to furnish feed for plaintiff's hogs for 1890, and for the value of hogs for plaintiff's meat for 1890, a copy of which contract is hereto attached, marked Exhibit A, and made a part hereof.

"2d. The said contract expired by its terms on the 1st day of March, 1889, but has been renewed from year to year thereafter by the parties thereto, and which contract does not expire by its terms until the 1st day of March, 1891.

"3d. That by the terms of said contract, and the renewal thereof, the defendant agreed to employ plaintiff, and did employ plaintiff, at and for the sum of \$50 per month, and plaintiff agreed to render services on said farm for said sum, and the parties thereto agreed in said contract that the work hands working on said farm should be boarded by plaintiff at the rate of \$10 per month, and that said sums were to be paid monthly by defendant.

"4th. That under said contract plaintiff has performed work and labor for defendant, and boarded his work hands for him, from the 1st day of November, 1887, to the 23d day of October, 1890, when defendant wrongfully discharged plaintiff from his services and violated the provisions of said contract without any sufficient cause therefor, and during all said time plaintiff has performed well and truly all the services and kept all the conditions and agreements on his part in said contract contained.

"5th. Plaintiff further alleges that defendant has failed and refused to furnish feed for the hogs of plaintiff to fat the same sufficient for the meat for plaintiff's use for the year 1890, but on the contrary has sold plaintiff's hogs, which were being fattened for meat for his use for the year 1890, whereby defendant has violated the terms and covenants of his part in said contract contained."

The agreement mentioned in the petition is as follows:

"GAGE COUNTY, NEB., August 29, 1887.

"This memorandum of agreement, made and entered into this 29th day of August, 1887, between A. J. Hale of said county, party of the first part, and M. Sheehan of said county, party of the second part, witnesseth, that the said party of the first part has employed the said party of the second part, and his son William, to work for him on his farm, known as the Sicily Creek farm, for one year, four months, from the 1st day of November, 1887, for the sum of fifty dollars per month, and agrees to board all extra hands employed on said farm for the sum of ten dollars per month while working on said farm. Said Hale to furnish sulky plow for boy to use. Said Hale hereby agrees to pay said party of the first part the said sums herebefore specified for the time and purpose therein expressed. Said Hale also agrees to keep two cows and two calves for the said party of the second part, and to furnish feed for hogs sufficient for the meat for his own use. Said party of the second part is to keep his team on said farm as long as he wishes, free of charge, by using them the same as he does party of the first part.

"A. J. HALE.

"M. SHEEHAN."

The second cause of action is for the sum of \$125.60 and interest, for extra meals furnished to the defendant below and his servants and employes, at the agreed rate of twenty-five cents per meal.

For answer the defendant below admits the execution of the agreement alleged, and denies the renewals thereof; admits that plaintiff and son commenced work for him November 1, 1887, at the rate of \$50 per month, under said agreement, and that the said plaintiff remained in his employ until October 10, 1890, when he was discharged for good and sufficient cause, which is alleged, but which need not be noticed. It is also alleged in the answer that the

plaintiff's son worked for the defendant below two months, in each of the years 1888, 1889, and 1890, and at no other time. There is also a counter-claim for \$450, for the negligence of the plaintiff below and for the conversion of property, the proceeds of the farm in question, and for the failure of his son to render services as stipulated.

The district court, on the trial of the cause, gave the following instructions, to which exception is taken:

"In relation to the discharge from further service, and under the contracts alleged in the petition, the law deems that both parties will act under it, or friendly to it, to promote its execution in good faith by both parties, and it is for you to say, from the evidence, whether either or both the parties have done so, and from the whole evidence determine whether the discharge of plaintiff by defendant was for good and sufficient cause, or was not for good and sufficient cause. If it was for good cause, the plaintiff would still be entitled to what he had already earned, less the amount of damages to the defendant resulting from plaintiff's failure to perform his part of the contract; but if the discharge was without cause, the plaintiff is entitled to any balance that may be due and unpaid, for services rendered under the contract, up to the time of the discharge."

By reference to the petition it will be seen the only employment of the plaintiff below was by virtue of the agreement set out above. His allegation is, "That by virtue of said contract and renewal thereof the defendant agreed to and did employ the plaintiff at and for the sum of \$50 per month, and the plaintiff agreed to render services on said farm for said sum." On this branch of the case there is an utter failure of proof. The agreement introduced in evidence, and which is set out above, recites that "The party of the first part [defendant below] has employed the party of the second part [plaintiff below] and his son William to work for him * * * for \$50 per month." If the plaintiff below worked for the defendant as alleged,

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he is entitled to recover the value of his services. But in order to recover for a wrongful discharge he is required to allege and to prove a contract or agreement under which he would be entitled to employment, for it is an elementary rule that where one sues to recover by virtue of a contract it must appear that he has some rights under such contract. In this case the defendant below had contracted for the services of two persons. It does not appear from the pleadings that there was any agreement to employ the plaintiff below without his son, and for all that is disclosed the service of the latter was the principal inducement for the employment of the two. Presumptively the son was a minor, and, in contemplation of law, the servant of the plaintiff below. The latter could contract for the services of his son and recover therefor. It may also be assumed that a cause of action would accrue in his favor on said contract upon the refusal to employ both himself and his son. There is, however, no allegation that the defendant below has refused employment to the father and son, or that the services of the latter were ever tendered him. Since there is alleged no breach of the contract introduced in evidence, it follows that the question of damage on account of the discharge of the plaintiff below should not have been submitted to the jury, and the giving of the instructions complained of was error, for which the judgment should be

REVERSED.

THE other judges concur.

HENRY LARIMER V. ABSLAM WALLACE.

FILED MARCH 29, 1893. No. 4770.

1. **Guardian's Sale of Real Estate : NOTICE: PROOF: COLLATERAL ATTACK.** In a collateral attack on a guardian's sale of real estate, where all the steps required have been taken, a sale made and confirmed, and a deed made to the purchaser, the sale will be sustained if the court had jurisdiction, although there may be irregularities which in a direct proceeding would render the sale erroneous.
2. ———: **PROOF OF POSTING NOTICE.** Proof by affidavits of posting public notices is not exclusive. The statute merely provides a mode which is sufficient, but does not provide that it shall supersede all other forms of proof.

ERROR from the district court of Gage county. Tried below before BROADY, J.

Griggs, Rinaker & Bibb and *W. V. A. Dodds*, for plaintiff in error:

There is no proof of the posting of notices of sale as required by Gen. Stats., sec. 56, p. 286; sec. 83, p. 291; sec. 90, p. 292, sec. 404, p. 593. Proof of posting the notices should be made by affidavit of the party who posted the same, stating when, where, and by whom the notices were posted. (*State v. Otoe County*, 6 Neb., 130.) A sheriff's return that notice was duly published will not be accepted as proof, the law providing the manner of proof to be by affidavit of any person having knowledge of the fact, specifying the time when, and the paper in which, the publication was made. (*Miller v. Lefever*, 10 Neb., 77.) There is no reference to the posting of any notices of sale in the case at bar. The record is entirely silent upon this point. The only reference to the posting of any notices is the reference to an entirely different piece of land, in the unverified report of the guardian. Proof of posting must be by

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affidavit of some kind. If not so shown, and if not shown by the sworn report it is fatal. (*Persinger v. Jubb*, 52 Mich., 304; *Cooper v. Brock*, 41 Id., 488; *Thomas v. Le Baron*, 8 Met. [Mass.], 363; *Hudson v. Hulbert*, 15 Pick. [Mass.], 423; *Blossom v. Brightman*, 21 Id. [Mass.], 285; *Mundy v. Monroe*, 1 Mich., 68; *Woods v. Monroe*, 17 Id., 242.) Essentials required by statute must affirmatively appear on record, or be proved as by law required. (*Chase v. Ross*, 36 Wis., 268; *McCrubb v. Bray*, 36 Id., 268-333; *Blodgett v. Hitt*, 29 Id., 169.) This sale can be attacked collaterally. (*Montour v. Purdy*, 11 Minn., 278; *Davis v. Hudson*, 11 N. W. Rep. [Minn.], 136; *Babcock v. Cobb*, 11 Minn., 347; *Grier's Appeal*, 101 Pa. St., 412; *Williams v. Reed*, 5 Pick. [Mass.], 480; *Persinger v. Jubb*, 52 Mich., 304; *Sowards v. Pritchett*, 37 Ill., 517; *Ryder v. Flanders*, 30 Mich., 343; *Coe v. Nash*, 28 Id., 259; *Toll v. Wright*, 37 Id., 93; *Blackman v. Baumann*, 22 Wis., 611; *Thomas v. Le Baron*, 8 Met. [Mass.], 363; *Hathaway v. Clark*, 5 Pick. [Mass.], 490; *Loring v. Steineman*, 1 Met. [Mass.], 204; *Reynolds v. Schmidt*, 20 Wis., 380.) The license was not granted until after the sale was made. Eleven days elapsed between the last newspaper publication and time of sale. The proceeding was void. (*Hartley v. Croze*, 37 N. W. Rep. [Minn.], 450.)

A. H. Babcock and J. A. Smith, contra:

The evidence in this case is that the notice was published four consecutive weeks, commencing August 24, A. D. 1875, and that the sale occurred September 25, 1875. This would make the last publication September 14, which extended to next publication day, to-wit, September 21, or to within four days of the sale. This was sufficient compliance with the statute. (*Dexter v. Cranston*, 2 N. W. Rep. [Mich.], 674; *Morrow v. Weed*, 4 Ia., 95; *Frazier v. Steenrod*, 7 Id., 346; *Brigham v. Boston & Albany R. Co.*, 102 Mass., 14.) Proof by affidavit of the posting of notice is neither

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exclusive nor necessary. The report of the guardian that she posted notice is *prima facie* evidence and its sufficiency cannot be attacked collaterally. (*Cooper v. Sunderland*, 3 Ia., 139; *Shawhan v. Loffer*, 24 Id., 228; *Stanley v. Noble*, 59 Id., 666; *Wade v. Carpenter*, 4 Id., 360; *Little v. Sinnett*, 7 Id., 324; *Frazier v. Steenrod*, 7 Id., 339; *Long v. Burnett*, 13 Id., 28; *Pursley v. Hayes*, 22 Id., 11; *Emery v. Vroman*, 19 Wis., 735.) The court had jurisdiction. If that jurisdiction was improvidently exercised, it is not to be corrected at the expense of a purchaser who had a right to rely upon the order of the court as an authority emanating from a competent jurisdiction. (*Perkins v. Fairfield*, 11 Mass., 227; *Stall v. Macalester*, 9 O., 23.) Non-compliance by a guardian with the requirements of the statute relative to the notice to be given of the sale of real estate of the ward, under license of the probate court, will not invalidate the title of a *bona fide* purchaser. (*Palmer v. Oakley*, 2 Douglas [Mich.], 433; *Woods v. Monroe*, 17 Id., 241-2; *Cooper v. Sunderland*, 3 Ia., 136.) The failure of a guardian to give security as required by statute upon obtaining an order for the sale of real estate will not render a sale void, regularly made and approved. (*Watts v. Cook*, 24 Kan., 278; *Bryan v. Bauder*, 23 Id., 95; *Fleming v. Bale*, 23 Id., 88.) When proceedings are in a court of general jurisdiction, and jurisdiction appears by record, even though it does not show everything necessary to regularity, yet it will be presumed, unless the contrary expressly appear; and even if irregularity or gross error do appear, the judgment cannot be questioned collaterally. This rule applies as well to proceedings under special statutes as under the common law. (*Falkner v. Guild*, 10 Wis., 506; *Carr v. Commercial Bank of Racine*, 16 Id., 52; *Allie v. Schmitz*, 17 Id., 175; *Robertson v. Kinkhead*, 26 Id., 560; *Seward v. Didier*, 16 Neb., 61; *Saxon v. Cain*, 19 Id., 488; *Trumble v. Williams*, 18 Id., 153; *Cooper v. Sunderland*, 3 Ia., 136; *Seymour v. Ricketts*, 21 Neb., 245;

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Roberts v. Flanagan, 21 Id., 503; *Grignon's Lessee v. Astor*, 2 How. [U. S.], 339; *Thompson v. Tolmie*, 2 Peters [U. S.], 162; *Ballow v. Hudson*, 13 Gratt. [Va.], 672; *McPherson v. Cunliff*, 11 Serg. & R. [Pa.], 422; *Lalanne's Heirs v. Moreau*, 13 La., 433.) Guardian's sale of land cannot after confirmation be collaterally attacked as illegal in an action for the land brought against one who in good faith derives his title under the purchaser at such sale. (*Brown v. Christie*, 84 Am. Dec. [Tex.], 608; *Bunce v. Bunce*, 59 Ia., 537.)

MAXWELL, CH. J.

This is an action of ejectment to recover the southeast quarter of section 34, township 5, range 6 east. The defendant claims under a guardian's sale and the plaintiff claims that the proceedings were void. On the trial of the cause a jury was waived and the cause tried to the court, which found in favor of the defendant and dismissed the action. There is but little dispute as to the facts. The parties entered into a stipulation as follows:

"It is stipulated and agreed that the patent title to the land in this action was issued to Henry Larimer, a minor and the plaintiff in this action, dated September 1, 1868; that the defendant acquired title to said lands by regular chain of conveyance from Ellen E. Larimer, as guardian of Henry Larimer, the plaintiff in this action, based upon a sale of said land made by said guardian; that the title to said land is in the plaintiff, unless the proceedings of said guardian in the sale of said land is sufficient to convey plaintiff's title thereto, and if said proceedings of said guardian in making said sale are valid, then the title to said premises is in the defendant, and he is a purchaser in good faith and for a valuable consideration, except such notice as the records of conveyances disclose; that the abstract of title to the said land may be introduced in evidence and have the same force and effect as the original deeds of conveyance would have were they introduced."

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The defendant then introduced in evidence proof of the guardian's appointment, etc., her petition to sell the land, as follows:

"In the district court of the first judicial district of Nebraska, held in and for Gage county.

"To the Honorable the said District Court:

"The petition of Ellen E. Larimer, of the county of Scott, in the state of Iowa, shows:

"1. That she is the mother and duly appointed guardian of Henry Larimer, a minor child, born September 19, 1865, as shown by the papers hereto attached, marked Exhibit 'A,' and that said child lives with your petitioner in the said county of Scott.

"2. That said Henry Larimer has no estate whatever, real or personal, except the following, to-wit: The S. E. $\frac{1}{4}$ of sec. 34 in T. 5, R. 6, in Gage county, Nebraska, which said lands he owns in fee.

"3. That said lands are uncultivated and wholly unproductive and are now liable for a large amount of unpaid taxes for a long time due thereon.

"4. That the value of said lands does not exceed \$1,000.

"5. That said Henry Larimer is wholly dependent upon your petitioner for his support and education.

"6. That your petitioner is unable by reason of her poverty to support and educate said Henry Larimer in a proper manner, and that it would be to the great benefit of said Henry Larimer if said lands should be sold and the proceeds of the sale thereof be applied towards his education and support. And your petitioner asks that a license to sell said lands may be granted to her in the manner provided by law.

ELLEN E. LARIMER.

"STATE OF IOWA, }
COUNTY OF SCOTT. }

"Ellen E. Larimer, having been first duly sworn, says that she is the named petitioner; that she has read the said

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petition above written and knows that the contents thereof are true.

"ELLEN E. LARIMER."

This was duly certified. This was presented to Judge Gantt, who made an order as follows:

"In the district court of the first judicial district, held in and for Gage county, Nebraska.

"In the matter of the application of Ellen E. Larimer, guardian of Henry Larimer, a minor child, to sell the S. E. $\frac{1}{4}$ of sec. 34, in T. 5 north, of R. 6 east, of the 6th principal meridian, in said Gage county, Nebraska, for the maintenance and education of said minor.

"It is now ordered that all persons next of kin of said ward, and all persons interested in the estate above described, appear before me at the court house in the city of Nebraska City, in the county of Otoe, Nebraska, on Friday, the 18th day of December, 1874, at the hour of 10 o'clock A. M. of that day, to show cause why a license should not be granted to said guardian to sell said real estate for the purpose aforesaid. Ordered, that a copy of this order be published four consecutive weeks in the *Beatrice Express*, prior to the time fixed for said hearing.

"Dated November 5, A. D. 1874.

"D. GANTT, Judge."

A notice was published as follows:

"In the district court of the first judicial district, held in and for Gage county, Nebraska.

"In the matter of the application of Ellen E. Larimer, guardian of Henry Larimer, a minor child, to sell the S. E. $\frac{1}{4}$ of section 34, in T. 5 north, of R. 6 east, of the 6th principal meridian, in said Gage county, Nebraska, for the maintenance and education of said minor.

"It is now ordered that all persons next of kin of said ward, and all persons interested in the estate above described, appear before me at the court house in the city of Nebraska City, in the county of Otoe, Nebraska, on Fri-

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day, the 18th day of December, 1874, at the hour of 10 o'clock A. M. of that day, to show cause why a license should not be granted to said guardian to sell said real estate for the purpose aforesaid. Ordered, that a copy of this order be published four consecutive weeks in the *Beatrice Express* prior to the time fixed for said hearing.

"D. GANTT, Judge."

This is accompanied by the affidavit of the publisher that he published the same four successive weeks, commencing on the 19th day of November, 1874.

On the day set for the hearing, Judge Gantt granted the following license:

"In the district court of the first judicial district in and for Gage county.

"In the matter of the application of Ellen E. Larimer, guardian of Henry Larimer, to sell real estate of said minor.

"And now this 18th day of December, 1875, this cause came on to be heard, at chambers, at the court house in Nebraska City, Otoe county, in pursuance of the order heretofore made in this cause on all persons interested in the said estate, to show cause, if any they had, why a license should not be granted to said guardian to sell said real estate for the maintenance and education of said minor; and it appearing to the Hon. D. Gantt, judge, presiding in said first judicial district, that publication of said order and notice to the next of kin of said minor, and all persons interested in said estate, was duly made in the manner and for the time prescribed by law, in the *Beatrice Express*, a newspaper printed and having a general circulation in the said county of Gage, and the said judge having heard and examined the proofs of the said guardian (no one appearing to resist said application), and being fully advised in the premises, doth find that the income of said minor is not sufficient to maintain and educate the said minor. It

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is therefore ordered that the said Ellen E. Larimer, as guardian aforesaid, be and is hereby licensed to sell the real estate of the said minor, in her said petition described, to-wit, the S. E. $\frac{1}{4}$ of sec. 34, in T. 5 N., R. 6 east, in said county of Gage, for the maintenance and education of said minor. And it is further ordered that said guardian shall, before making such sale, take and file the oath required by law, and shall make due publication and give notice of said sale in the manner and for the time prescribed by law. The terms of said sale shall be cash; and the said guardian is required to make full return of all her proceedings herein to the next term of the district court of said county of Gage. D. GANTT, Judge."

There is also a copy of the appraisement as follows:

"INVENTORY OF PROPERTY.

"We, L. G. Coffin, sheriff of Gage county, in the state of Nebraska, Josiah Hawkins and Alfred Hazlett, two disinterested freeholders, residents of said county of Gage, the said Josiah Hawkins and Alfred Hazlett having been first duly sworn by said sheriff, do truly and impartially inventory and appraise the following property at its real value in money, to be sold as the property of Henry Larimer, by Ellen E. Larimer, his guardian, by virtue of a license granted by the district court of the first judicial district of the state of Nebraska, in and for the county of Gage, at the November term of said court, in the year 1874, to-wit: S. E. $\frac{1}{4}$ of sec. 34, T. 5 N., R. 6 east, in said Gage county, 160 acres, at \$4 per acre, \$640.

"Given under our hands this 23d day of September, A. D. 1875.

L. G. COFFIN,

"*Sheriff of Gage County, Nebraska,*

"By O. H. PHILLIPS, Deputy,

"ALFRED HAZLETT,

"JOSIAH HAWKINS,

"*Appraisers.*"

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There is also a report of sale as follows:

"Received the license hereto annexed, marked Exhibit 'A,' and, according to the command thereof, I did, on the 24th day of August, 1875, cause a notice (a copy of which is hereto annexed, marked Exhibit 'B'), to be published in the *Beatrice Courier*, a newspaper published in the county of Gage, Nebraska, and of general circulation therein, and continued the publication of the same for thirty-two days, and did post up copies of the said notice in five of the most public places in said Gage county, giving notice that I would, on the 25th day of September, 1875, at the south front door of the court house in said county, at 2 o'clock P. M. of said day, sell the said lands in said license mentioned, at public auction; and I did at said time and place sell said lands at public auction to Orren Stevens for the sum of \$430, he being the highest and best bidder therefor. That before the sale of said lands I did cause the same to be appraised in the manner required by law, which said appraisement is hereto annexed, marked Exhibit 'C,' and that the said sum of \$430 is more than two-thirds of the appraised value of said lands, to-wit, the S. E. $\frac{1}{4}$ of sec. 34, in T. 5 N., of R. 6 east, Gage county. That I did also before making said sale make and file with the clerk of the district court of said county the oath required by law. All done in Gage county, Nebraska.

"Witness my hand this 27th day of September, A. D. 1875.

ELLEN E. LARIMER."

There is the oath of the guardian as follows:

"I, Ellen E. Larimer, being first duly sworn, make oath and say that I am the guardian above mentioned of the said minor, Henry Larimer; that in disposing of the following real estate, to-wit, the S. E. $\frac{1}{4}$ of sec. 34, T. 5 N., of R. 6 east, of the principal meridian, in Gage county, Nebraska, which said lands I am licensed to sell by the said district court, I will use my best endeavors to dispose

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of the same in such manner as will be most convenient for the advantage of the said Henry Larimer and all other persons interested therein. "ELLEN E. LARIMER."

There is the bond, as follows :

"Know all men by these presents, that we, Ellen E. Larimer, of the county of Scott, in the state of Iowa, James Gamble, of the same place, and Joseph Suiter, of the county of Gage, in the state of Nebraska, are held and firmly bound unto the Hon. Daniel Gantt, judge of the district court of the first judicial district of Nebraska, and to his successors in office in the penal sum of \$1,000, current money of the United States; the payment of which sum to be well and truly made we and each of us bind ourselves, our executors and administrators, jointly and severally, firmly by these presents.

"The condition of the above obligation is such, that if the said Ellen E. Larimer, guardian of Henry Larimer, shall as such guardian sell under a license from the said district court the following lands, to-wit, the S. E. $\frac{1}{4}$ of sec. 34, T. 5 N., of R. 6 east, in said Gage county, in the manner prescribed by law for the sale of real estate by executors and administrators, and if the said Ellen E. Larimer shall account for and dispose of the proceeds of said sale in the manner provided by law, then this obligation to be void, otherwise to be and remain in full force.

"Witness our hands and seals this 10th day of December, 1874.

ELLEN E. LARIMER. [SEAL.]

"JAMES GAMBLE. [SEAL.]

"JOSEPH SUITER. [SEAL.]

"Subscribed and sworn to by Ellen E. Larimer and James Gamble before me, a notary public in and for Scott county, Iowa, this 10th day of December, A. D. 1874.

"JOHN W. BUCKMAN,

"Notary Public, Scott County, Iowa.

"The above bond and sureties therein approved.

"D. GANTT, Judge."

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The sale was advertised four weeks, the notice being as follows:

"SALE OF MINORS' LANDS BY GUARDIAN.

"By virtue of a license of the district court of the first judicial district of Nebraska, held in and for Gage county, to me granted, I, Ellen E. Larimer, guardian of Henry Larimer, a minor, will sell for cash at public auction on Saturday, the 25th day of September, A. D. 1875, at 2 o'clock P. M., at the south front door of the court house, in Beatrice, Gage county, Nebraska, the following real estate, situated in said Gage county, the land of said minor, to-wit, the southeast quarter of section 34, in T. 5 N., of R. 6 east.

ELLEN E. LARIMER,

"Guardian of Henry Larimer."

There is an affidavit of publication made by one of the publishers of the *Beatrice Courier*, a weekly newspaper, that the notice was published four consecutive weeks, commencing August 24, 1875; the fees, being \$7.50, were paid. There is also the confirmation of the sale as follows:

"In the district court of the first judicial district of Nebraska, held in and for Gage county.

"In the matter of the application of Ellen E. Larimer, guardian of Henry Larimer, to sell the lands of said minor.

"CONFIRMATION OF SALE OF LANDS.

"And now, on this third day of November, 1875, comes the said Ellen E. Larimer, by S. C. B. Dean, her attorney, and the court having fully examined the papers in this cause, and being fully advised in the premises, order that the sale of the lands made by said Ellen E. Larimer, under the license for that purpose heretofore granted by said court, be confirmed, and is hereby ordered that a deed of said lands be made by said Ellen E. Larimer to Orren Stevens, the purchaser of said lands.

D. GANTT, Judge."

Also a receipt for the purchase money as follows:

"In the district court of the first judicial district of the state of Nebraska, held in and for Gage county.

"In the matter of the application of Ellen E. Larimer to sell the lands of Henry Larimer, a minor.

"RECEIPT FOR PURCHASE MONEY.

"I, Ellen E. Larimer, aboved named, do hereby certify that I have received from Orren Stevens the sum of \$430, in full for purchase money of lands above mentioned, being the S. E. $\frac{1}{4}$ of sec. 34, T. 5 N., of R. 6 east, in said Gage county.

ELLEN E. LARIMER.

"In presence of

"JAMES GAMBLE."

This is duly authenticated. It will thus be seen that every step required by statute was taken by the careful judge who made the orders in the case. The principal ground relied upon for a reversal of the case is that there is no proof of the posting of the notices of the sale of the land, and *State v. Otoe County*, 6 Neb., 130, is cited to sustain that view. That was a direct proceeding to establish a public road, and it was properly held that it should appear when, where, and by whom the notices are posted. It is also true that the Code provides that the posting or service of a notice may be proved by affidavit of any competent witness attached to a copy of such notice or paper, to be made within six months of the time of posting up. We do not understand this mode of proof to preclude all other kinds of proof. The statute merely provides what shall be sufficient proof, but does not make that exclusive. No doubt there was sufficient proof of such posting before Judge Gantt when he confirmed the sale, and the order of confirmation is not subject to collateral attack. Some point is made on the date of the notice of sale, and of a misdescription of the land, but there appears to be no substantial ground of objection on those grounds. In a collateral at-

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tack on a guardian's sale of real estate, where all the steps required by statute have been taken, a sale made and confirmed and a deed made to the purchaser, the sale will be sustained if the court had jurisdiction, although there may be irregularities in the proceedings, which, in a direct proceeding, would render the judgment erroneous. The judgment is right and is

AFFIRMED.

THE other judges concur.

PACIFIC RAILWAY COMPANY IN NEBRASKA V. JAMES PERKINS.

FILED MARCH 29, 1893. No. 4940.

Condemnation Proceedings: NON-RESIDENT: DEFINITION.

The word "non-resident," in section 100, chapter 16, Compiled Statutes, relating to condemnation proceedings for right of way for a railroad, means a non-resident of the state and not of the land affected, or of the county where it is situate.

ERROR from the district court of Nuckolls county.
Tried below before MORRIS, J.

B. P. Waggener, James W. Orr, G. W. Stubbs, and David Martin, for plaintiff in error.

Schomp & Corson, contra.

MAXWELL, CH, J.

In 1889 the defendant in error brought an action in the district court of Nuckolls county against the plaintiff in error for trespass in entering upon and occupying a strip of land for right of way through the southwest quarter

of section 33, township 2 north, of range 7 west, in said county, said land being the property of the defendant in error. The plaintiff in error justified its entry upon the land and occupation of said strip by virtue of certain condemnation proceedings and the payment of the award of the commissioners to the county judge of said county. The reply consists of certain specific denials. On the trial of the cause certain questions were submitted to the jury which, with their answers, are as follows:

Q. 1. Did the plaintiff, James Perkins, ever live upon or occupy the S. W. $\frac{1}{4}$ of sec. 33, T. 2, R. 7, in Nuckolls county, Nebraska?

A. No.

Q. 2. Did the plaintiff James Perkins ever reside in Nuckolls county, Nebraska?

A. No.

Q. 3. Had said land up to the time of the location of the defendant's railroad upon it been vacant, unenclosed, unimproved, and unoccupied?

A. Yes.

Q. 4. Up to the time of commencing this action was said land still vacant, unenclosed, unimproved, and unoccupied, except by the location, construction, and operation of the defendant's railway?

A. Yes.

Q. 5. At the time of the location of the defendant's railway upon said quarter section was the land lying in a state of nature, with nothing growing on it but the grass and herbage common to our open prairie?

A. Yes.

Q. 6. Up to the time of commencing this action was said land lying in a state of nature, except by the construction and operation of the defendant's railway, with nothing growing on it but the grass common to our open prairies?

A. It was.

The jury returned a general verdict in favor of the de-

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fendant in error for the sum of \$18, upon which the judgment was rendered.

The principal contention of the defendant in error is that the defendant in error was a non-resident within the meaning of the statute.

Sec. 100, ch. 16, Comp. Stats., provides: "If, upon the location of said railroad, it shall be found to run through the lands of any non-resident owner, the said corporation may give four weeks' notice to such proprietor, if known, and if not known, by a description of such real estate, by publication four consecutive weeks in some newspaper published in the county where such lands may lie, if there be any, and if not, in one nearest thereto on the line of their said road, that said railroad has been located through his or her lands; and if such owner shall not, within thirty days thereafter, apply to said probate judge to have the damages assessed in the mode prescribed in the preceding sections, said company may proceed; as herein set forth, to have damages assessed, subject to the same right of appeal as in case of resident owners; and upon the payment of the damages assessed to the probate judge of the proper county for such owner, the corporation shall acquire all rights and privileges mentioned in this subdivision."

Sec. 97 of the same chapter also provides: "If the owner of any real estate over which said railroad corporation may desire to locate their road shall refuse to grant the right of way through his or her premises, the county judge of the county in which such real estate may be situated, as provided in this subdivision, shall, upon the application of either party, direct the sheriff of said county to summon six disinterested freeholders of said county, to be selected by said county judge, and not interested in a like question, unless a smaller number shall be agreed upon by said parties, whose duty it shall be to carefully inspect and view said real estate, and assess the damages which said owner shall sustain by the appropriation of his or her land to the

use of said railroad corporation, and make report in writing to the county judge of said county, who, after certifying the same under his seal of office, shall transmit the same to the county clerk of said county for record, and said county clerk shall file, record, and index the same in the same manner as is provided for the record of deeds in this state, and such record shall have the like force and effect as the record of deeds in pursuance of the statute in such case made and provided. And if said corporation shall at any time before they enter upon said real estate, for the purpose of constructing said road, pay to said county judge for the use of said owner the sum so assessed and returned to him as aforesaid, they shall thereby be authorized to construct and maintain their said road over and across said premises; *Provided*, That either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated, within sixty days after such assessment, and in case of such appeal the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified to the county clerk, to be filed and recorded as hereinbefore provided, in his office. But such appeal shall not delay the prosecution of the work on said railroad if such corporation shall first pay or deposit with such county judge the amount so assessed by said freeholders. Such railroad company shall in all cases pay the costs of the first assessment; *Provided*, That if, on appeal, the appellant shall not obtain a more favorable judgment and award than was given by said freeholders, then such appellant shall be adjudged to pay all the costs made on such appeal; *Provided further*, That either party may appeal from the decision of the district court to the supreme court of the state, and the money so deposited shall remain in the hands of the county judge until a final decision be had, subject to the order of the supreme court."

It seems to be conceded that the defendant in error was

Pacific R. Co. v. Perkins.

a resident of the state, although he did not reside on the land in question or even in Nuckolls county. Was he, therefore, a non-resident within the meaning of the statute? The word "non-resident" is ordinarily used in connection with certain rights of creditors and property owners. Thus, a person who does not reside in a school district in which he has property is a non-resident of such district. So, if he owns property in any village, city, or county in which he does not reside he is a non-resident of such county, city, or village. In the broad sense, it is applicable to every one who does not reside at a particular place named. The word, however, when applied to the bringing of an action, is used in a more limited sense. Thus, the Code requires an action to be brought in the county where the defendant resides or may be served with summons. If the action affects the title or possession of real estate, then the action is to be brought in the county where the lands lie and the summons may be sent to any county in the state and be there served on the defendant. The Code also provides for service by publication where it appears from the oath of a plaintiff, his agent or attorney, that the defendant cannot be served with summons within the state. One of the grounds of attachment is, that a defendant is a non-resident. In these cases the term is used to signify one who does not reside within the state. In such case, as personal service cannot be had within the boundaries of the state, constructive service by publication is permitted. This results from the necessity of the case, the duty of the courts to enforce the rights of a plaintiff upon property of the defendant within the jurisdiction of the court, and the inability to obtain personal service on him within the jurisdiction of the court. If personal service can be had upon a defendant within the state, then service by publication cannot be made. In the general acceptation of the term it means one who resides out of the state. (*Frost v. Brisbin*, 19 Wend. [N.Y.], 11, 32 Am. Dec., 423; *Pooler v. Maples*, 1 Wend. [N.Y.], 65; 16 Am. & Eng. Ency.

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of Law, 718.) In the matter of *Thompson*, 1 Wend. [N. Y.], 43, it was held that an attachment might issue against the property of a debtor notoriously residing abroad whether he was absent temporarily or permanently. In either case he was a non-resident within the meaning of the statute. Considerable stress is laid by the plaintiff in error upon the power of the legislature to declare service by publication in regard to public roads, etc., sufficient. In answer to this statement it is sufficient to say that the question involved in this case is not one of power of the legislature, or the want of it, but the meaning of the word "non-resident"; but even in regard to such cases this court recently held that where the land-owner had no actual notice of the proceedings till it was too late to appeal, he could recover damages for injury to his land by the location of the road. (*Pawnee County v. Storm*, 34 Neb., 735.) The judgment is right and is

AFFIRMED.

THE other judges concur.

GERMAN INSURANCE COMPANY OF FREEPORT V. AM-
BROSE EDDY,

QUEEN INSURANCE COMPANY OF LIVERPOOL V. AM-
BROSE EDDY,

AND

GERMAN FIRE INSURANCE COMPANY OF PEORIA V.
AMBROSE EDDY.

FILED MARCH 29, 1893. Nos. 5014, 5015, 5016.

1. **Fire Insurance: VALUED POLICY ACT: PROVISION OF POLICY FOR APPOINTMENT OF ARBITRATORS.** Under the valued policy act of 1889, stipulations in a policy of insurance in conflict with any of the provisions of that act are inoperative, and

36	461
41	728
36	461
44	562
36	461
49	817
51	292

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this applies to a provision in case of loss for the appointment of arbitrators. If the property is "totally destroyed" there is nothing to arbitrate.

2. ———: ———: DEFINITION OF "TOTALLY DESTROYED."

Where all the combustible material in a building is destroyed by fire, although portions of the brick walls are left standing, but are so injured by the fire that they must be torn down, for the purpose of insurance the property is totally destroyed; but if the person insured should use the brick, or other material not destroyed, to rebuild, the company would be entitled to the value of such brick or material.

3. ———: ———: INSTRUCTIONS. Under the issues made by the pleadings the principal question was whether or not the property had been "totally destroyed," and this question was fairly submitted to the jury and the verdict is supported by the evidence.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

Lawrence Heiskell, J. R. Wash, Adams & Scott, I. W. Lansing, and Charles Offutt, for plaintiffs in error.

Abbott, Selleck & Lane, contra.

MAXWELL, CH. J.

The above cases were tried together in the court below and a verdict rendered in favor of the defendant in error against the German Fire Insurance Company of Peoria for \$1,824.46, against the Queen Insurance Company for \$1,037.23, and German Insurance Company of Freeport for \$912.22, all of said verdicts with interest from date of loss. The petition in each case alleges a total loss. The answers admitted the execution of the policies and the liability of the companies thereon, but alleged in avoidance that the policies provided that "in the event of disagreement as to the amount of loss the same shall be ascertained by two competent and disinterested appraisers, the assured and this company each selecting one and the

two so chosen shall first select a competent and disinterested umpire; and the award in writing of any two shall determine the amount of such loss." And the said policies each further provided that "No suit or action on this policy shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements." That there was "disagreement as to the amount of loss" and a demand by the insurance companies in due time that the question as to the amount of loss be submitted to arbitrators; that the demand was acceded to on July 3, 1890, and an arbitrator selected by each party on that day, and that therefore the actions were prematurely brought, they having been instituted while the arbitrators were acting and before they made an award; and that on September 12, 1890, two of the arbitrators made an award fixing the amount of the loss at \$1,500 and no more.

The reply is as follows: "That he denies each and every allegation in said answer contained except as hereinafter specifically admitted. He admits that on the 3d day of July, 1890, there was an agreement by and between the parties hereto that the amount of the loss sustained by the plaintiff in the said fire should be submitted to arbitration as provided in the policy herein sued on; that the plaintiff chose the said Royer and the defendant chose the said Harte to act in the said arbitration.

"Plaintiff further alleges that from that time he and the one he so chose, the said Royer, used their best efforts to have the said appraisal and arbitration made as provided in the said policy, but alleges that they were not able to get the said Harte to act with them, and alleges that the said Harte neglected and refused to act in said arbitration for more than the space of thirty days thereafter, although often requested so to do. That by reason of the refusal of the said Harte to act in said arbitration and the failure of the said Harte and the said Royer to make any appraisal of the said loss in said fire for more than the space of

German Ins. Co. v. Eddy.

thirty days the said loss was never arbitrated and determined under the said policy and in accordance with provisions therein contained. And that after having waited for more than thirty days after the said Harte and Royer had been chosen as herein set forth, and they having failed in any way to act upon said loss or to set a time when they would act thereon, plaintiff commenced this suit. That after the suit herein was begun the said defendant came to the plaintiff and requested that the whole of the matters in dispute involved in said loss and in the suit might be submitted to the said Harte and the said Royer and to one to be selected by them who should act in case of their disagreement; that at that time, to-wit, on the 21st day of August, 1890, it was agreed by and between the parties herein that said arbitration should take place on that day, to-wit, on the 21st day of August, 1890; that in pursuance of the said agreement, and not under the stipulations of the policy, the said Harte and the said Royer agreed upon the said Gray to act with them in the said arbitration; that after the said Gray had been so chosen, then the said Harte refused to act with the said Royer and appraise the said loss in accordance with the said agreement, and the said Harte neglected, failed, and refused to in any way go on with the said appraisal and arbitration, and said Harte never did act or try to act with said Royer under said agreement; that afterwards he learned, and now alleges the fact to be, that the said Harte was not a disinterested party, but that he was in the employment of the defendant, and was, and is prejudiced in its favor and against this plaintiff, and was not a proper person to choose for an arbitrator under the said policy, whereby and because of the failure of the said Harte, Royer, and Gray to act in accordance with the terms of the said agreement under which they were chosen, and because plaintiff had learned of the prejudice of the said Harte as herein alleged, the said last mentioned agreement became null and void, and the plaintiff thereafter

notified the defendant that he withdrew from all further attempts at an arbitration of the said loss, and that he should proceed at once to clear away the rubbish and ruins of the said fire and to rebuild his house; that it was long after the said notice to the defendant, and after he had proceeded and cleared away the ruins from the said fire, that the said Harte and the said Gray made their pretended appraisal and award of the loss incurred by the said fire, and that when the said Harte and the said Gray made their pretended award there was no property there for them to view; that said loss has never been arbitrated or in any manner settled either under and by virtue of the terms of the said policy or by virtue of any agreement by and between the parties herein."

1. The first error relied upon is that the verdict is not sustained by sufficient evidence. The ground upon which this claim is made is that the proof fails to show a total loss of the property. In 1889 an act was passed as follows (sec. 43, ch. 43, Comp. Stats.): "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.

"Sec. 44. This act shall apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal which shall hereafter be made of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state."

What is the meaning of the words "wholly destroyed" when applied to a building? If the building was constructed of brick or other non-combustible material fire

could not destroy that. Therefore the brick or other material not destroyed would have some value which the party retaining should pay for. From the nature of the case, therefore, the words referred to do not mean the *debris* from a building destroyed. This may have some value, and if so, the insurance company, if it pays the loss, is entitled to compensation for. The words when applied to a building mean totally destroyed as a building; that is, that the walls, although standing, are unsafe to use for the purpose of rebuilding and must be torn down and a new building erected throughout. (*Seyk v. Millers Nat. Ins. Co.*, 41 N. W. Rep. [Wis.], 443.) In the case cited it is said: "The evidence is that all the combustible material in the structures was destroyed, and although portions of the brick walls were left standing, yet they were useless as walls, and many, perhaps most, of the bricks therein were spoiled by the heat. It cannot be doubted that the identity and specific character of the insured buildings were destroyed by the fire, although there was not an absolute extinction of all the parts thereof. This was an entire destruction of the buildings, within the meaning of the statute. (1 Wood, Ins., sec. 107.)" There is abundant proof in the record that such was the situation of the building in the case at bar after the fire.

2. Where there is a total loss the provision for arbitration—except it may be to ascertain the value of the *debris*—does not apply. The provisions of the statute override any stipulations in the policy to that effect, as an insurance company can only do business in the state on the conditions provided by law. If the property was totally destroyed, therefore, stipulations in the policy as to arbitration must yield to the statute. (*Queen Ins. Co. v. Leslie*, 24 N. E. Rep. [O.], 1072; *Seyk v. Millers Nat. Ins. Co.*, 41 N. W. Rep. [Wis.], 443.) The jury brought in a verdict for a small sum, less than the amount of the policy, in each case, having evidently deducted the value of the brick and other

Wiseman v. Bruns.

material left from the burned building. Of this the companies have no cause to complain.

3. The question whether or not the building was wholly destroyed is one of fact and it seems to have been fairly submitted to the jury. It is unnecessary to review the instructions. There is no material error in the record and the judgment is

AFFIRMED.

THE other judges concur.

HANSEN WISEMAN v. HENRY C. BRUNS.

FILED MARCH 29, 1893. No. 5067.

JURORS: ATTENDANCE AT COURT WITHIN TWO YEARS: CHALLENGE. It is sufficient cause of challenge to any person called as a juror in the district court that he has been summoned and attended that court as a juror at any term held within two years prior to the time of such challenge, and this rule applies to talesmen who were summoned and served as jurymen.

ERROR from the district court of Cedar county. Tried below before **POWERS, J.**

Wilbur F. Bryant, for plaintiff in error.

A. M. Gooding, contra.

MAXWELL, CH. J.

This action was brought by Bruns against Wiseman on account, the answer being a general denial. On the trial a verdict was returned in favor of Bruns, upon which judgment was rendered. While the jury was being impaneled one Jenal was called as a juror and in his exam-

36	467
62	20

Wiseman v. Bruns.

ination on his *voir dire* stated that he had been a talesman in that court a little more than one year prior to that time. He was thereupon challenged for cause by Wiseman and the challenge was overruled, to which exceptions were taken. Wiseman then exhausted his peremptory challenges and now brings the case into this court on error. Sections 658 to section 662 of the Code provide the mode of drawing and summoning a petit jury.

Section 664 provides, "Whenever the proper officers fail to summon a grand or petit jury, or when all persons summoned as grand or petit jurors do not appear before the district courts, or whenever at any general or special term, or at any period of a term for any cause there is no panel of grand jurors or petit jurors, or the panel is not complete, said court may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men, having the qualifications of jurors, and each person summoned shall forthwith appear before the court, and if competent, shall serve on the grand jury or petit jury as the case may be, unless such person may be excused from serving or lawfully challenged."

Section 665 provides that "No person shall be summoned as a juror in any district court of this state more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror, at any term of said court held within two years prior to the time of such challenge; *Provided*, No finding, verdict or inquest returned by any jury shall be invalidated, or set aside, because a member of such jury served as a grand or petit juror within the two years immediately preceding such verdict or inquest."

It will be observed that the word "summon" or "summoned" is used whether the names of jurors are drawn from the box or they are called in by the sheriff, and the same words are used by this court in *Dodge v. People*, 4

State, ex rel. Levy, v. Spicer.

Neb., 220, in speaking of talesmen brought in by the sheriff to serve as jurors. The statute has no exceptions in favor of talesmen and we do not feel justified in making exceptions. The purpose of the statute seems to be to exclude professional jurymen, but whether so or not the language is plain and unambiguous. It is therefore a good cause of challenge to one called as a juror that he has been summoned and attended the district court as a juror at any term of court held within two years prior to the time of challenge, and this rule applies to those summoned as talesmen. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

36	469
53	770

STATE OF NEBRASKA, EX REL. MARK LEVY, V. J. H.
SPICER, CLERK OF THE DISTRICT COURT.

FILED MARCH 29, 1893. No. 4979.

1. **Mandamus:** A RELATOR having a personal right to be enforced by *mandamus* may bring an action in the name of the state on his relation.
2. —: TRUST FUNDS HELD BY CLERK OF DISTRICT COURT.
On the facts stated in the petition, the defendant held the money and notes in controversy as trustee, and it was his duty to pay and deliver the same to the parties entitled thereto.
3. —: DEMURRER OVERRULED and leave given to answer in five days.

ORIGINAL application for *mandamus*.

Capps & Stevens, for relator.

Tibbets, Morey & Ferris, contra.

MAXWELL, CH. J.

The defendant is the clerk of the district court of Adams county, and this is an application for a *mandamus* to compel him to pay over certain moneys in his hands claimed to be due the relator. He has demurred to the petition upon two grounds: First, that the action is improperly brought in the name of the state, and second, that the facts stated in the petition are not sufficient to constitute a cause of action. The petition is as follows:

"Comes now the relator, Mark Levy, and respectfully represents unto this honorable court that on May 24, 1888, Loeb and Emile Lindner commenced in the district court of Adams county, Nebraska, by the filing of their petition, an action for partition of divers and sundry descriptions of real estate mentioned in their said petition; that Rosa Hirsch, Harry Hirsch, Benjamin Hirsch, and Jacob Hirsch were defendants in said action; that Rosa Hirsch was the wife, and the said Harry, Benjamin, and Jacob Hirsch were the only heirs and children of Samuel Hirsch, deceased, who died intestate in the city of Hastings, Adams county, Nebraska, on the 18th day of April, 1888; that on the 16th day of June, 1888, John M. Ragan was duly appointed by said court as guardian *ad litem* for the said Harry, Benjamin, and Jacob Hirsch, the minor heirs of said Samuel Hirsch, deceased; that on the 18th day of June, 1888, said action came on to be heard upon the said petition and the answer by Rosa Hirsch in her own proper person, and the answer of John M. Ragan, the duly appointed guardian *ad litem* of said minors, and the evidence presented in open court, and the same was submitted to said court. On consideration whereof the court found that the plaintiff Abraham Loeb was the owner in fee-simple of an undivided one-half ($\frac{1}{2}$) part and interest to the real estate described in said petition, and that said Harry, Benjamin, and Jacob Hirsch were the children of Samuel Hirsch, late

of said county, deceased, and as his heirs are each the owner in fee-simple of one-sixth ($\frac{1}{6}$) part of the real estate described in said petition; that it was further ordered and adjudged by the said court at said time that said shares of each of said parties interested in the real estate described in said petition and said decree be and the same was thereby confirmed, and it was adjudged therein that said partition be made accordingly, if an equitable division thereof could be effected without detriment to the persons interested therein.

"It was further ordered and adjudged in said district court that J. H. Graham, William M. Lowman, and J. D. Crosswaith be, and they were thereby, appointed referees to make partition of said real estate into the requisite number of shares, and report the same at that term of court if possible, and if not, that they make due report at the following term of said court.

"That on the 19th day of June, 1888, a commission authorizing and requiring the referees to carry into effect the terms and requirements of said decree was issued out of the district court of Adams county, Nebraska, authorizing and commanding them to make partition of said real estate as follows:

"To Abraham Loeb one-half ($\frac{1}{2}$) in value of said real estate; to Harry, Benjamin, and Jacob Hirsch, severally, one-sixth ($\frac{1}{6}$) each in value of said real estate, in manner as provided by law.

"That on said day said referees took the oath prescribed by law, as fully appears upon said commission; that on the 20th day of June, 1888, said referees, having first took the oath required by law as hereinbefore related, carefully examined the condition of all the real estate described in said petition with a view to making partition thereof among the persons hereinbefore named, and said referees reported and found that the partition of said premises could not be made without great prejudice to the owners thereof, for the rea-

MAXWELL, CH. J.

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"Comes now the relator, Mark Levy, and respectfully represents unto this honorable court that on May 24, 1888, Loeb and Emile Lindner commenced in the district court of Adams county, Nebraska, by the filing of their petition, an action for partition of divers and sundry descriptions of real estate mentioned in their said petition; that Rosa Hirsch, Harry Hirsch, Benjamin Hirsch, and Jacob Hirsch were defendants in said action; that Rosa Hirsch was the wife, and the said Harry, Benjamin, and Jacob Hirsch were the only heirs and children of Samuel Hirsch, deceased, who died intestate in the city of Hastings, Adams county, Nebraska, on the 18th day of April, 1888; that on the 16th day of June, 1888, John M. Ragan was duly appointed by said court as guardian *ad litem* for the said Harry, Benjamin, and Jacob Hirsch, the minor heirs of said Samuel Hirsch, deceased; that on the 18th day of June, 1888, said action came on to be heard upon the said petition and the answer by Rosa Hirsch in her own proper person, and the answer of John M. Ragan, the duly appointed guardian *ad litem* of said minors, and the evidence presented in open court, and the same was submitted to said court. On consideration whereof the court found that the plaintiff Abraham Loeb was the owner in fee-simple of an undivided one-half ($\frac{1}{2}$) part and interest to the real estate described in said petition, and that said Harry, Benjamin, and Jacob Hirsch were the children of Samuel Hirsch, late

of said county, deceased, and as his heirs are each the owner in fee-simple of one-sixth ($\frac{1}{6}$) part of the real estate described in said petition; that it was further ordered and adjudged by the said court at said time that said shares of each of said parties interested in the real estate described in said petition and said decree be and the same was thereby confirmed, and it was adjudged therein that said partition be made accordingly, if an equitable division thereof could be effected without detriment to the persons interested therein.

"It was further ordered and adjudged in said district court that J. H. Graham, William M. Lowman, and J. D. Crosswaith be, and they were thereby, appointed referees to make partition of said real estate into the requisite number of shares, and report the same at that term of court if possible, and if not, that they make due report at the following term of said court.

"That on the 19th day of June, 1888, a commission authorizing and requiring the referees to carry into effect the terms and requirements of said decree was issued out of the district court of Adams county, Nebraska, authorizing and commanding them to make partition of said real estate as follows:

"To Abraham Loeb one-half ($\frac{1}{2}$) in value of said real estate; to Harry, Benjamin, and Jacob Hirsch, severally, one-sixth ($\frac{1}{6}$) each in value of said real estate, in manner as provided by law.

"That on said day said referees took the oath prescribed by law, as fully appears upon said commission; that on the 20th day of June, 1888, said referees, having first took the oath required by law as hereinbefore related, carefully examined the condition of all the real estate described in said petition with a view to making partition thereof among the persons hereinbefore named, and said referees reported and found that the partition of said premises could not be made without great prejudice to the owners thereof, for the rea-

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son that it would divide the land and town lots therein specified into small parts which would be worthless, and further, that said partition could not be made on account of incumbrances thereon; that on the 22d day of June, 1888, said cause came on to be heard upon the report of the referees in said action and a motion to confirm the same and it appearing to said court that said partition of the real estate mentioned in said petition could not be made without prejudice to the owners thereof, and said court being satisfied of the truth thereof, said report was by the order of the said court entered upon the records thereof; and it was further ordered and adjudged by the court at said time and in said order that said referees should proceed to sell said premises described in said petition at public sale after giving due and legal notice thereto as required upon sales under execution. Said sales of said real estate were ordered to be held after the giving of legal notice thereof: The Adams county land, at the front door of the court house in Adams county, Nebraska; the Kearney county land, at the front door of the court house in Kearney county, Nebraska; the Red Willow county real estate, at the front door of the court house in Indianola; and the land situated in Brown county, at the front door of the court house in the town of Ainsworth therein. It was further ordered in said decree that said sales should be for one-third cash in hand, one-third in one year, and one-third in two years, with approved security upon all deferred payments, with interest at the rate of eight per cent per annum until the same be paid. Said referees were further ordered to report their doings relative to the sale of said real estate.

“That thereupon said referees proceeded to the procurement of certificates to all liens upon the real estate described in said petition and caused all of the same to be duly advertised according to the terms of the decree of the said court; and said referees made report of all of their doings at stated periods; that all of the reports of sales made by

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said referees were presented to said court for examination and the same were in each and every instance, upon careful examination and consideration of said court, found to be in all respects conducted according to law, and said sales were by said court in each and every instance confirmed, and said referees were ordered to execute and deliver to the purchasers at the said sales deeds for the real estate so purchased by them; that all of the real estate described in said petition was sold by said referees and deeds conveying said premises to the purchasers thereof in fee-simple were duly executed by them and delivered to the purchasers thereof; that the proceedings and confirmation of all said sales were duly certified to and placed of record in the county where said real estate so sold is situated.

"That in said action in said district court of Adams county, after the sale and disposition of said real estate by the referees as hereinbefore mentioned, said cause came on to be finally heard on the application of the parties to said action for the purpose of having the proceeds of the sales of the property distributed; it was found by said court that Abraham Loeb was entitled to a one-half interest in the moneys and note in the hands of said referees appointed in said case, the proceeds of said sales; that Harry, Benjamin, and Jacob Hirsch, the heirs of Samuel Hirsch, deceased, were entitled to an undivided one-half interest, that is, one-sixth interest each, in and to the moneys and notes in the hands of said referees, the proceeds of the sales of real estate in said partition suit; that at said time the reports of the referees were correct; that the referees appointed in said action distributed the proceeds arising from the partition sale of lands in said action as follows: One-half of said proceeds to Abraham Loeb, and the remaining one-half, share and share alike, to Harry Hirsch and Benjamin Hirsch and Jacob Hirsch; that the supplemental and final report of the referees be and the same is confirmed.

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"Your relator further represents unto the court that on December 19, 1890, William M. Lowman, one of the referees appointed by the court in said action, filed his petition in said court in said action showing unto the district court in the action where Abraham Loeb and Emile Lindner were plaintiffs, and Rosa Hirsch, Harry Hirsch, Benjamin Hirsch, and Jacob Hirsch were defendants, he was duly appointed by said court as referee to make partition of certain real property and to pay the proceeds of said sale in compliance with the order of said court; that the said referee had complied with the directions and decrees of said court and had sold said lands in fulfillment of the orders of said court, and that all of the said sales had been duly reported to the court, approved by the court; that said William Lowman, referee, then held as such officer in said action, the same being proceeds of sales, the following amounts of money and notes, to-wit: \$475.52 in cash, being one-half of net proceeds of last payment of sale Adams county, Kearney county, and Red Willow county lands, and the Ainsworth town property, as described in the petition filed in said action; that the other one-half (\$475.52) of the net proceeds of said payment had been paid to Abraham Loeb, according to the order of said court; that said William M. Lowman had on hand also the following notes to-wit: one for \$359, dated February 16, 1889, due December 1, 1889, eight per cent interest from date until paid; one for \$221.64, dated April 1, 1889, due April 1, 1890, eight per cent interest; one for \$221.64, dated April 1, 1889, due April 1, 1891, eight per cent interest from date until paid; one for \$637.10, dated November 15, 1889, due November 15, 1890, eight per cent from date until paid; one note for \$637.10, dated November 15, 1889, due November 15, 1891, eight per cent interest from date until paid; that said notes and money were taken and received as proceeds of sales of the real estate described in said petition for partition, and that the same

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were received and taken in pursuance of the orders and decrees of said court; that said William M. Lowman, referee, had business of such a nature that it would require his removal from the jurisdiction of the said court, and that he had no interest in the above described moneys or notes, and thereby offered to bring said moneys and notes into court and ask that he be discharged from further liability therefor, and that he be discharged as referee in said action.

"That afterwards, to-wit, on the 24th day of December, 1890, said cause came on to be heard on the petition and showing filed by said referee, William M. Lowman, and from the facts stated therein and the report of said referee and the evidence produced in court the said court found that under the previous order entered in said action said referee had paid to Abraham Loeb \$475.15; that there was then in the hands of said referee the sum of \$475.15 in cash, and the further sum of \$2,076.48 in notes taken as part payment for the sale of the real estate described in the petition for partition; said court then and there further found that said referees had complied fully and completely with the orders of said court appointing them and that said referee, William M. Lowman, should be discharged; that the report of said referees had been theretofore made in said action be by said court confirmed. The court therein ordered said William M. Lowman, referee, to pay the money, notes, and property then in his possession to the clerk of the said court, this respondent; it was then and there adjudged by said court that said William M. Lowman should pay to the clerk of said court, this respondent, the said sum of money and notes found to be in his hands for the use and benefit of the persons and parties entitled thereto, and it was further ordered and adjudged by the said court that the said William M. Lowman be and he was thereby discharged from further liability. That on the 19th day of December, 1890, said William M.

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Lowman paid to the clerk of the said court, J. H. Spicer this respondent, the said sum of \$475.52 in cash, and notes and securities amounting to the sum of \$2,076.48, and that said respondent still has and holds said cash and notes so delivered to him at said time by said William M. Lowman, referee; that on the 5th day of March, 1891, he had a settlement and adjustment of his business with one Abraham Loeb, who was plaintiff in said partition suit and adjudged therein to be the owner and holder of a half interest in the proceeds of the sales of said real estate, and the persons to whom it was by said district court adjudged that one-half of said proceeds should be paid and delivered to; that in said settlement had by this relator with said Abraham Loeb said Abraham Loeb assigned, transferred, and set over to this relator, for value received, all of his interest in and to the property adjudged to belong to him in said partition suit; that on said 2d day of July, 1891, your relator filed said assignment of record in the office of the district clerk of Adams county, Nebraska, the said assignment executed by the said Loeb to this relator; and your relator then demanded that said respondent pay over to him the entire interest adjudged to be the property of said Abraham Loeb so assigned to your relator, and that said respondent then and there refused, and still refuses, to pay over and deliver to your relator the interest in said property so assigned to him by said Abraham Loeb; that your relator is still the owner and holder of the entire interest of said Abraham Loeb found and adjudged to belong to him in said partition proceedings. That the decrees, orders, and judgments hereinbefore mentioned are in full force and effect in the district court of Adams county, Nebraska; that the same and all of them are unappealed from; that no proceedings in error have ever been prosecuted or taken therefrom, and that the same and all of them are final and irrevocable, and that said partition suit has been finally disposed of; that there is no just reason, either

legal or equitable, why the respondent should not comply with the orders and decrees of the district court rendered in said action and pay and deliver over to your relator all of the notes and moneys and property which were therein found and adjudged by the said court to be the property of Abraham Loeb, and of which your relator is now, and ever has been since March 5, 1891, the sole and only owner by assignment as hereinbefore stated; that he has no other adequate remedy to secure his rights in the premises other than those sought to be exercised by this information in this action.

"Wherefore your relator respectfully prays this honorable court that in the exercise of its original jurisdiction the court may grant a peremptory writ of *mandamus*, commanding J. H. Spicer, clerk of the district court of Adams county, Nebraska, the respondent herein, immediately upon the receipt of said writ, to deliver and pay over to your relator all notes, moneys, and property adjudged and decreed to the said Abraham Loeb in the partition suit mentioned in this information as having been assigned to your relator, and your relator prays for such other order and general relief as may be lawfully required in the securing of his rights in this proceeding."

If the facts stated in the petition are true, the real estate in question has been sold under proceedings in partition, the sale confirmed, deeds made to the purchasers, and the proceeds of said sales are now in the hands of the defendant. This court, therefore, in this proceeding has nothing to do with the partition case. For the purpose of this demurrer the proceedings in that case are supposed to be regular and unobjectionable. The right of the relator to bring an action by *mandamus* in the name of the state has been recognized from the earliest period of our history as a state, and may be regarded as a settled rule which, if changed, it should be done by the legislature. The first point of the demurrer, therefore, is not well taken.

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So far as the petition shows, the defendant holds the money and notes in question as a mere trustee and not strictly as clerk of the court. The court in relieving Mr. Lowman from his trusteeship was not required to appoint the defendant. Any other person within the jurisdiction of the court, if deemed suitable, might with equal propriety have been appointed, and received the money and property of the relator. The petition shows that the money is due to the relator, and that it is the duty of the defendant to pay the same and to deliver to him his share of the notes. If the defendant has a defense to the action he must set it up by answer. The demurrer is overruled and the defendant has leave to answer in five days.

DEMURRER OVERRULED.

THE other judges concur.

MARY E. L. WILLIAMS V. JAMES C. EIKENBARY.

FILED MARCH 29, 1893. No. 4990.

1. **Action of Replevin: ADMINISTRATION: REVIVOR: PLEADING BY ADMINISTRATRIX.** An action was brought by one J. W. W. against J. C. E., as sheriff, and was twice reversed in the supreme court. Before the third trial J. W. W. died and the cause was revived in the name of M. E. L. W., who states in her petition that she sues as executrix. *Held*, Sufficient to show that she brought the action in her representative capacity.
2. ———: ———: ———: **DEFECTIVE ANSWER: HARMLESS ERROR.** In such action an answer was filed by J. C. E., but the name of the plaintiff was stated to be J. W. W. instead of M. E. L. W. Sufficient appeared in the answer to show to what petition it applied, and it was in fact filed in the proper case. No motion was made and filed to strike it from the files. *Held*, Error without prejudice.

3. ———: ———: ———: PLEADING EVIDENCE. On the trial the plaintiff sought to disprove the allegations of her petition by showing that her duties as executrix had ceased and she had been discharged. *Held*, That she should have pleaded the facts by supplemental petition, and not having done so the testimony was properly excluded.
4. Evidence held to sustain the verdict.

ERROR from the district court of Cass county. Tried below before FIELD, J.

J. H. Haldeman, for plaintiff in error.

H. D. Travis, E. H. Wooley, and Byron Clark, contra.

MAXWELL, CH. J.

This is an action of replevin. It was tried the first time in 1886, the judgment of the district court being reversed. The case is reported in 22 Neb., 210.

In 1889 the cause was again brought into this court and the judgment again reversed. In May, 1889, James W. Williams, the original plaintiff, died, and the present plaintiff, as executrix, filed a petition on June 11, 1890. It is claimed on behalf of the plaintiff in error that she brought the action in her individual capacity and not as executrix. The commencement of the petition is as follows:

“MARY E. L. WILLIAMS, PLFF.,	} Petition.
v.	
J. C. EIKENBARY, SHERIFF OF CASS COUNTY, DEFT.	

“Plaintiff complains of the defendant and says that James W. Williams was her husband and departed this life about May 1, 1889, and plaintiff was shortly thereafter appointed executrix of his estate by the county court of Douglas county, Nebraska. That at the time of his death he was plaintiff in above action.”

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There follows a statement of the matter in controversy between the defendant in error, as sheriff, and the deceased James W. Williams. In our view this sufficiently shows the capacity in which the plaintiff sues. The objection, therefore, is overruled. The second objection is that no answer was filed to the petition, and therefore all proof contradicting it was improperly admitted. The record shows that the answer is entitled in the proper court and purports to be an answer to the petition of the plaintiff, but in the title James W. Williams is designated as the plaintiff instead of the executrix. This is not a fatal defect. Enough appears in the answer to show that it was intended to apply to the petition in question. Therefore, if the plaintiff desired to object to the same, she should have done so by motion to strike it from the files, when the plaintiff would have had leave to amend. Having failed to do so, the objection is overruled.

It is claimed that the court erred in refusing to permit the plaintiff to deny that she was executrix; that her power had ceased and she was discharged. In this there was no error. If the plaintiff desired to prove her discharge as such executrix, she should have pleaded the same in a supplemental petition. It would be trifling with the court to make up the issues upon the theory that the plaintiff was executrix and then permit her to disprove that fact on the trial. The court did right in excluding the testimony.

It is claimed that the court erred in admitting in evidence the petition, affidavit, order of attachment, and undertaking in attachment, because the papers in question are entitled the Commercial Bank, plaintiff, v. Lawrence Holland & Tewksberry and Cooper, defendants, while the order of attachment and undertaking in that case show that they were issued in a case where the bank was plaintiff and Lawrence Holland, *alone*, defendant. In other words, that an attachment was issued against one of the de-

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fendants in that case and not against all. The answer to this is that so far as appears there was no cause of attachment against the other defendants, and hence none was sought. The objection is untenable and is overruled.

It is alleged that the verdict is not sustained by sufficient evidence. We think differently, however. The value of the property taken seems to have been agreed upon at \$1,706.35, and the damages allowed for the detention are \$502.58, which seems to be the interest on the principal sum, from the time of the taking to the date of the trial, at seven per cent. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

JOHN CARTER V. STATE OF NEBRASKA.

FILED MARCH 29, 1893. No. 5012.

1. **Conviction for Larceny: EVIDENCE HELD INSUFFICIENT to sustain the verdict.**
2. **Criminal Law: LARCENY: EXAMINATION OF WITNESSES.** To justify the proving of contradictory statements of a witness for the purpose of impeaching him, the answer of the witness on cross-examination must be material so that the cross-examining party would be allowed to give it in evidence. (*Smith v. State*, 5 Neb., 181.)
3. ———: **CHARACTER OF ACCUSED: IMPEACHMENT OF WITNESSES.** Where a person on trial for a crime has not himself put his general character in issue, the state cannot do so on the pretext of impeaching a witness by disproving the statements of the witness.

**ERROR to the district court for Washington county.
Tried below before HOPEWELL, J.**

Jesse T. Davis, for plaintiff in error.

George H. Hastings, Attorney General, for the state.

MAXWELL, CH. J.

The plaintiff in error was convicted of stealing certain live hogs of the value of more than \$35, and was sentenced to imprisonment in the penitentiary for the period of four years. The first objection is that the verdict is not supported by the evidence. The testimony of Mr. Russell, the owner of the hogs, as to the number and kind of hogs taken, is as follows :

Q. When did you see them last before that?

A. It was along perhaps the 4th or 5th; the 5th maybe, along there. It was after the 1st, several days, that I looked them over again to see if they were there, all of them, as I often did once in a week or two.

Q. When was it you missed them?

A. About the 9th, maybe the 10th.

Q. How many did you miss?

A. Nine; that is what I think it was. I cannot count correctly not to a hog, but it was not less than eight nor more than ten.

Q. And they were taken in this time, between the 5th and 9th?

A. Yes, sir.

Q. How large hogs were they?

A. There was two of them—well, one I would call a large brood sow, and then a medium sized—good size—and the balance of them with the 200 there together, a part of them spring pigs and a part older. Understand that I could not guess—that is to within maybe fifty pounds—but I thought if they took an average, it would be a little under 200, and if they took better than an average it would be a little over 200.

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Q. About what time did you know, and do you know now, what the price of hogs was? That can be answered by yes or no. State whether or not you did or did not know.

A. I did at the time but have forgotten now. I did know at the time, but I have forgotten what it was at that time.

Q. Are you able to state what the value of those hogs were at that time?

A. Well, taking that except those two—those two, I know about what they were worth. They were worth, the smallest ones, about twelve dollars, and the others about fifteen for those two brood sows I speak of, and the shoats that I called them, I would think from my recollection of the price, six or seven dollars would be enough for them.

Q. Seven dollars apiece?

A. Seven dollars a head; yes, sir.

Q. What would you put the total value of the nine that were taken?

A. It would be a little over sixty dollars.

It will be observed that his testimony is but little better than a guess either as to the number or value of the hogs, and his is all the testimony upon that point. He also testifies in regard to finding one of the hogs as follows:

Q. Did you see any of them after that?

A. Yes, sir.

Q. How long afterwards?

A. I think it was the 25th. It was either the 25th or the 26th of January of the same month, that I saw them. Either the 25th or the 26th.

Q. Where?

A. I saw them at Bill Taylor's.

Q. Where is that from your place?

A. About three miles and three-quarters north and half a mile east.

Q. That is in what county?

A. That is in Washington county, state of Nebraska.

Q. That Bill lives?

A. Taylor lived there; yes, sir.

Q. How came you to see this animal?

A. Well, I had got on a little track of what we call the gang there. We termed it that way. That is what we call them, and we got a little help and had a man looking there; that is the truth of it, and then he told me there was a hog there. I went there looking for this hog and found it there.

Q. Where was the hog?

A. It was in a pen between two corn cribs. I would say the cribs were ten feet apart facing south. Around here back of the corn crib it was fenced a hog pen, and between these two cribs there was boards laid across and hay, etc., laid over, and after looking every place else about the place, I got into that hog pen and I crawled back two or three feet maybe and the hog could not turn around. There was a little partition cut off there, and there was that hog.

Q. Could the hog get out itself?

A. No, sir; not without breaking the fence. Certainly not.

Q. Was the hog at that time permitted to pass out to view so that people generally could see it?

A. No, sir; it was planked up, the back part of it, and it could not get out. It was shut up.

Q. Did you ascertain how it came there?

A. Well, I did by Bill Taylor.

Q. He was the man that lived there?

A. Yes, sir.

Q. When he told you anything about it was the defendant present?

A. No, sir.

Q. Did you look after this same hog again?

A. Yes, sir.

Q. How long afterwards?

A. The next day.

Q. Was it there?

A. No, sir.

Q. Where was it; where did you find it?

A. I did not find it the next day: it was not there.

And this is all the testimony as to finding any of the hogs. The plaintiff in error is a son of a neighbor of Mr. Russell and the only direct testimony to connect the plaintiff in error with the transaction, is the testimony of Mrs. Taylor. She testifies that between the 6th and 10th of January, 1891, the plaintiff and one Spence came to their residence.

Q. Where was your husband's team the next day?

A. I do not know where it was.

Q. Was it at home?

A. No, sir.

Q. When did it return?

A. I think it returned the next evening. I am not positive.

Q. Who came with it?

A. I do not know who came with the team. I saw Carter and Mr. Spence there.

Q. What did they do there that evening?

A. Well, they were out of doors. I did not see them.

Q. Didn't they come in the house?

A. They were in the house, but I was in another room. I had gone to bed.

Q. What did they say or do there?

A. I did not hear all they said.

Q. Did you see them do anything?

A. No, sir.

Q. Did you see them have any money there?

A. The door was open and seen one of them pay my husband some money.

Q. How much money?

A. I think about seven dollars.

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Q. The morning before that, or that morning, state if you had discovered a hog at your place?

A. Yes, sir; there was a hog there.

Q. What kind of a hog; just describe it?

A. It was black and white spotted.

Q. The size, give that the best you can.

A. It would weigh 250 or 300 pounds.

Q. What was said between Mr. Carter, Mr. Spence, and your husband in reference to this sow?

A. I did not hear their conversation about the sow?

Q. It was a sow?

A. Yes, sir.

Q. You did not hear any about the sow?

A. No, sir.

Q. How long after that did the sow remain there?

A. It was about two weeks I think.

The hogs were kept by Mr. Russell in a large inclosure, the fence being composed of seven barbed wires. It appears from other testimony that some of them broke out at times, but whether or not they strayed at such times is not stated. For aught that appears this money may have been derived from a perfectly legitimate transaction, and in the absence of proof to the contrary this is the presumption. The testimony shows that the plaintiff is known to have been at home the first six days in January, 1891, and if testimony in his behalf is to be relied upon, his whereabouts is accounted for up to the 10th instant. In the latter part of January, 1891, the plaintiff in error went to Sioux City, and from there to Missouri, and hired out to a man near Lathrop, and had been there about five weeks when he was arrested and came voluntarily back to this state. There is testimony tending to show that the plaintiff in error, for some time before the larceny in question, had frequented saloons and seemed to be starting in the road to ruin, and these facts seem to have induced the jury to convict. It also appears that a son of Mr. Russell

went to Lathrop and called on the village marshal to assist him in arresting the plaintiff in error. From the scene that followed it is apparent that either the marshal or young Mr. Russell stated to certain persons that they were about to arrest a thief. The result was that when young Mr. Russell and the marshal had arrested the accused at the residence of a Mr. Brown and were about to take him to the village for examination they were met by a mob of fifteen or more persons, who took the accused to a tree and hung him to make him confess being connected with a larceny in Missouri. Having failed in obtaining a confession for the alleged crime the mob undertook to make him confess the stealing of the hogs in question. In this also they failed, whereupon the prisoner was surrendered to the custody of the marshal and volunteered to return to this state without a requisition. While the trial was in progress this hanging in Missouri was stated by the prosecuting officer to the court and jury, although up to that point no evidence in regard to the matter had been offered. Afterwards testimony was introduced in regard to the matter. The testimony was clearly irrelevant and was highly prejudicial. The crime, if one had been committed, of which there is absolutely no proof, had no connection with the charge in this case, and all reference to it should have been excluded. There are also some alleged admissions of the plaintiff in error which he denies absolutely, and in any event are not sufficient to show him guilty of the crime. The most damaging testimony is the alleged cross examination of his father as follows:

Q. Didn't you meet W. H. Russell on the county road west of Herman about the last days of January, 1891, the exact day I cannot state, and did not W. H. Russell say to you at that time, "I suppose you know what I have been doing with hog thieves and was afraid you would take exceptions," and you said at that time and place to W. H. Russell, "you are doing right in prosecuting these men;

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I have talked to John, my son, about his way of doing, time and again, and he tells me it is none of my damned business; he is hardly ever at home, and when he comes he only stays an hour or two; he is not at home nights at all and is off again, and it is nearly killing his mother; she don't sleep nights at all; I will do nothing more for him; I have helped him out of one scrape which took some money and I will not interfere in any way hereafter." Didn't you say those words to that effect?

This is repeated in about a dozen different forms on the part of the state and brought the general character of the accused directly before the jury, as well as being collateral to the issue.

The rule is thus stated by Bishop (Cr. Proc., sec. 1112) as follows: "Bad character is never admissible in evidence against a defendant as foundation for presuming guilt. Not even on a charge of stealing a horse can it be shown that he is an associate of horse thieves. On the other hand as a branch of the general presumption of innocence, his character is presumed to be at least of ordinary goodness. But when this presumption has been met by *prima facie* evidence of guilt he may bring forward in defense his good character, in rebuttal whereof the prosecuting state may show that his character is bad. (*People v. White*, 14 Wend. [N. Y.], 111; *State v. Jackson*, 17 Mo., 544; *Thompson v. Church*, 1 Root [Conn.], 312; *State v. Merrill*, 2 Dev. [N. Car.], 269; *Dowling v. State*, 5 Sm. & M. [Miss.], 664; *State v. Lapage*, 57 N. H., 245; *State v. Hare*, 74 N. Car., 591; *Harrison v. State*, 37 Ala., 154; *People v. Fair*, 43 Cal., 137; *Cheney v. State*, 7 Ohio, 222; *Ante*, secs. 1103-1106; *Ackley v. People*, 9 Barb. [N. Y.], 609. See *The State v. Ford*, 3 Strob. [S. Car.], 517, note; 3 Greenl., Ev., sec. 25; *Schaller v. State*, 14 Mo., 502; *Dupree v. State*, 33 Ala., 380; *State v. Wells, Coxe* [N. J.], 424; *McDaniel v. State*, 8 Sm. & M. [Miss.], 401; *Carter v. Commonwealth*, 2 Va. Cas., 169; *Reg. v. Rowton*, Leigh

& C. [Eng.], 520, 10 Cox C. C., 25; *Young v. Commonwealth*, 6 Bush [Ky.], 312.)”

In regard to the impeachment of a witness by proving contradictory statements made by him the rule is this: If the answer of a witness is of a nature that the cross-examining party would be allowed to give it in evidence, then it is a matter in which the witness may be contradicted and is deemed material. (Maxw. Cr. Proc., 608; 2 Phillips, Ev., 959; *Smith v. State*, 5 Neb., 183.) In the case last cited an attempt was made, as in this case, to impeach a witness by showing that on a former trial he had testified that he was only ten or fifteen rods away from the scene of the crime, but the court held the question was collateral to the main issue and not material. Now no one will contend that the answer of the father, made in the absence of the son, which, at most, is a mere opinion, could be given in evidence to show the guilt of the son. Yet this is the kind of testimony resorted to in this case, although he swears positively that he had no knowledge of such guilt. The case of *People v. Cox*, 21 Hun [N. Y.], 47, is somewhat similar in this respect to the case at bar. In that case the mother of the accused testified that he was at home when a certain letter was delivered, and on cross-examination she was asked if she had not stated to certain persons, naming them, that he had written such letter. These persons were then called to prove the fact, but the testimony was held to be improper and was excluded. (*State v. Patterson*, 74 N. Car., 157; *State v. Patterson*, 2 Ired. Law [N. Car.], 346; *Wilder v. Peabody*, 21 Hun [N. Y.], 376; *Kaler v. Builders' Mut. Fire Ins. Co.*, 120 Mass., 333.)

There is some proof that the plaintiff in error was advised that a warrant had been issued for his arrest; that being so informed he went to Sioux City, and from there to Lathrop, Missouri; that a family was residing near there who were former neighbors of his father; that he was

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employed by a farmer at that point, and was working for him when arrested. It also appears that when arrested he gave the name of J. W. Baxter. Considerable stress is laid by the prosecution upon this change of name. The accused himself denies having changed his name, but had the check for his wages when arrested filled out in that name, as it was his mother's maiden name. A change of name is always a strong circumstance tending to show an anxiety of the party to hide his identity, but it does not establish a party's guilt. It at the most is a mere circumstance to be considered with others in the case. In regard to the alleged confessions of the accused to young Mr. Russell it is sufficient to say that, at the most, they show an anxiety on the part of the plaintiff in error to be relieved from the charge. We must consider his youth, his inexperience, and the confidence he reposed in young Mr. Russell. He made no confession of guilt, but expressed an anxiety to have the matter settled, etc. Throughout he showed a lack of knowledge, or disregard of his rights, that fall far short of showing guilt. It is doubtful if the prosecution was conducted with that regard for the rights of the accused which the constitution and the laws of the state guarantee to every person accused of crime. The testimony consists largely of guesses and inferences, and the one party who is clearly shown to be guilty is not even charged with crime. The testimony is wholly insufficient to sustain the verdict, and the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

MIHALOVITCH, FLETCHER & COMPANY ET AL. V.
DAVID L. BARLASS.

FILED MARCH 29, 1893. No. 4564.

1. **Attachment: INDEMNIFYING BOND.** An officer in whose hands an attachment is placed to be levied upon goods of the debtor in the action may, where there is doubt as to the ownership of the goods, demand an indemnifying bond from the plaintiff in the attachment.
2. ———: **ACTION ON INDEMNIFYING BOND: FRAUD BY OFFICER EXECUTING WRIT: PLEADING.** If an officer, by collusion and fraud, should permit a judgment to be wrongfully rendered against him, these facts may be pleaded to an action on such bond, together with a statement of the plaintiff in attachment that the property levied upon was that of the debtor in attachment.
3. ———: ———: ———: **DEFENSE.** The fact that an officer permits judgment to be rendered against him for an alleged wrongful levy without making a defense, although a circumstance which with others may show fraud, yet in order to do so it must appear that a defense was available.

ERROR from the district court of Adams county. Tried below before GASLIN, J.

Bowen & Bowen, for plaintiffs in error.

Capps, McCreary & Stevens, and *John M. Ragan*, *contra*.

MAXWELL, CH. J.

This is an action upon an indemnifying bond for the sum of \$550 given by the plaintiffs in error to the defendant in error, who was sheriff of Adams county, to indemnify him for levying upon and selling certain property levied upon as belonging to one Fist, who was indebted to the plaintiff in error. On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of

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\$550, upon which judgment was rendered. The principal error relied upon is that the verdict "is contrary to law."

The testimony tends to show that on the 24th of September, 1887, the plaintiffs in error commenced an action in the district court of Adams county against one Emmanuel Fist to recover the sum of \$274.50, and caused an attachment to be issued which was placed in the hands of the defendant in error for service; that he refused to levy the same upon the property alleged to be that of Fist, unless the plaintiffs in error would execute to him an indemnifying bond, which they did, whereupon he levied the attachment on certain property in a car on the St. Joe & Grand Island Railway Company which was consigned to the A. Furst Distilling Company, St. Joe, Mo. The plaintiff in error recovered judgment against Fist and an order for the sale of the property so levied upon, and the property was sold under said order. On the 7th of November, 1887, the Furst Distilling Company brought an action in replevin in the district court of Adams county against the defendant in error for the recovery of said property, but as it had been sold under the order of court and the proceeds applied on the judgment of the plaintiffs in error, the only remedy of the Distilling Company was an action for conversion of the property. The action was therefore changed to one for conversion, and the names of the plaintiffs in error were omitted from the petition, and the action proceeded against the defendant in error for the value of the property, and judgment was recovered for the sum of \$2,000, which judgment is unreversed. The defendant in error thereupon brought an action on the indemnifying bond. It seems to have been claimed in the court below that there was no lawful authority to give an indemnifying bond and therefore it is void, and the capable judge before whom the case was tried, in overruling the motion for a new trial, bases his action principally on the ground that such authority does exist and that the bond is valid. We have no doubt his

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views in that regard are correct and that the action may be maintained.

It is claimed that the defendant in error permitted judgment to go against him by default, and that the plaintiffs in error had a full and sufficient defense to the action. No doubt if an officer, by collusion and fraud, should wrongfully permit a judgment to be rendered against a party giving the indemnity, these facts might be shown as grounds for impeaching the judgment; in which case it would be necessary to submit the alleged defense, and the reasons for not asking to intervene in the former action and present the defense then. We find nothing of the kind here. In the absence of collusion and fraud the parties will be bound by the judgment, and we cannot in this action enter into a consideration of the merits of that case. No reason is shown by the record for the reversal of the case, and the judgment is

AFFIRMED.

THE other judges concur.

AUGUST GARDELS V. ROBERT F. KLOKE ET AL.

FILED MARCH 29, 1893. No. 4712.

1. **Statute of Frauds: MEMORANDUM OF CONTRACT TO PURCHASE REAL ESTATE.** A memorandum of an agreement in the form of a receipt which describes the land sold, the price and time of payment, with an admission of the receipt of \$25 on the contract, and duly signed by the vendors, is sufficient under the statute.
2. ———: ———: **ACCEPTANCE BY VENDEE.** Prior to the statute of frauds a parol contract for the sale of land with delivery of possession was valid. The statute has merely changed the common law so that the party to be charged—ordinarily the vendor—

36	493
44	712
36	493
49	372
53	120

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need sign the memorandum. The vendee accepting the same is bound as at common law.

3. **Contract for Sale of Real Estate: FORECLOSURE OF VENDOR'S RIGHTS: DECREE.** An action will lie to foreclose the rights of a purchaser in a contract for the sale of real estate, and the court by its judgment may direct the purchaser to comply with the terms of the contract within a reasonable time to be named by the court, or order the premises sold and the proceeds applied to the payment of the judgment.
4. ———: ———: **JUDGMENT.** The justice and equity of the case will determine the character of the judgment.

ERROR from the district court of Cuming county.
Tried below before POWERS, J.

C. C. McNish and J. C. Crawford, for plaintiff in error:

Gardels filed a motion to open the judgment and be allowed to defend, supported by affidavits, showing that as soon as summons had been served upon him he had employed counsel to defend the suit, and that he only failed to make a defense because he was led to believe that the action would be dismissed. This motion should have been sustained. (*Haggerty v. Walker*, 21 Neb., 596; *Clutz v. Carter*, 12 Id., 113; *Blair v. West Point Mfg. Co.*, 7 Id., 146; *Taylor v. Trumbull*, 32 Id., 508; *Griswold Linseed Oil Co. v. Lee*, 47 N. W. Rep. [So. Dak.], 955; *Bertline v. Bauer*, 25 Wis., 486; *Stafford v. McMillan*, 25 Id., 566; *Beatty v. O'Connor*, 5 N. E. Rep. [Ind.], 880.) The petition did not state a cause of action. The receipt set out in plaintiffs' petition does not amount to such an agreement for the sale and conveyance of land as will take the case out of the statute of frauds. Mere part performance is not sufficient. (*Poland v. O'Connor*, 1 Neb., 50; *Mushrush v. Devereaux*, 20 Id., 49; *Baker v. Wiswell*, 17 Id., 52; *Guthrie v. Anderson*, 28 Pac. Rep. [Kan.], 164.) A petition that fails to state a cause of action will not support a judgment. (*Burlington & M. R. Co. v. Kearney County*, 17 Neb., 511; *Thompson v. Stetson*, 15 Id., 112.)

M. McLaughlin, contra:

Under the statute the agreement need only be signed by him who is to be charged by it. (*Gartrell v. Stafford*, 12 Neb., 552; *Robinson v. Cheney*, 17 Id., 679.) The party to be charged means the person who sells the land. (*Frazer v. Ford*, 2 Head [Tenn.], 464.) The petition is sufficient to support the decree. A written proposal containing the names of the contracting parties and the terms of the proposed agreement, signed by the vendor, when accepted and assented to by the party to whom the sale is made, is a sufficient memorandum; and the delivery of such instrument as a proposal, and the acceptance thereof and assent thereto by the party to whom it is made, may be proved by parol testimony. (*Reuss v. Picksley*, L. R., 1 Exch. [Eng.], 342; *Sanborn v. Flagler*, 9 Allen [Mass.], 474; *Himrod Furnace Co. v. Cleveland & M. R. Co.*, 22 O. St., 451; *McWilliams v. Lawless*, 15 Neb., 131.)

MAXWELL, CH. J.

This is an action to foreclose a contract for the sale of real estate. Personal service was had upon the purchaser, who made default, and at the September term of the district court for Cuming county, a judgment was entered against the purchaser that he pay the purchase money within thirty days, or that said premises be sold as upon execution and the proceeds derived from said sale be brought into court to be applied in payment of said judgment, and that the vendors have judgment for any deficiency that may exist after the sale of said land, etc. Within thirty days from the date of said judgment the purchaser filed a motion as follows:

"Comes now the defendant and moves the court to open up and set aside the decree and default heretofore entered in this case and permit the defendant to interpose his defense for the following reasons, to-wit:

"1. That the plaintiffs' petition fails to state a cause of action against the defendant.

"2. The defendant has a good, valid, meritorious, and complete defense to the cause of action set forth in the plaintiffs' petition, as is shown by the answer herewith filed, and which defense he did not interpose for the reason that prior to the entering of said decree the plaintiffs agreed with the defendant that they would dismiss their said action, which agreement and promise the defendant relied upon.

"3. Said decree was entered in the absence and without the knowledge or consent of the defendant, and in violation of the plaintiffs' promise that they would dismiss their said action."

He accompanied this motion with an answer, in effect a denial of the facts stated in the petition. A large number of affidavits were filed by both the plaintiffs and defendant, tending to show what was done in relation to the contract and also that the vendors promised to dismiss the action, by reason of which the purchaser failed to make an appearance in the case. These affidavits are about equal in number on behalf of the vendor and vendees, and upon the evidence thus submitted the court refused to vacate the judgment, and from the order overruling the motion the cause is brought into this court.

The principal ground relied upon for a reversal of the case is that the petition fails to state a cause of action. The petition is as follows:

"1. Plaintiffs complain of the defendant for that on or about the — day of February, 1890, the plaintiffs, being the owners in fee of the following described premises, situated in Cuming county, Nebraska, to-wit, the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 34, T. 22, R. 6 east, except a certain parcel in the northeast corner of said described land, which is platted, recorded, and known as Hugh's addition to West Point, on said days sold the same to the defendant

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for the sum of \$3,100, and on the same day the defendant paid the plaintiffs on said purchase the sum of \$25, and then and there agreed to pay the remainder of said purchase money on the first day of May, 1890.

"2. That on the same day, and after the payment of the said \$25 on said purchase, the plaintiffs made and delivered to the defendant, in writing, a receipt and memorandum of said sale and purchase, and the said defendant accepted the same and has ever since retained possession thereof; said memorandum is, in substance, as follows:

"WEST POINT, NEBR., Febr. —, 1890.

"Received of August Gardels \$25 as part purchase money for the purchase of 35 acres in the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, Sec. 34, T. 22, R. 6 east, Cuming county, Neb., for \$3,100, balance to be paid, possession given, and deed delivered May 1st, 1890.

R. F. KLOKE.

"OTTO BAUMAN."

"3. The plaintiffs have duly performed all the conditions of said agreement on their part to be performed, and on the 5th day of May, 1890, tendered to the defendant a deed of said premises in pursuance of the terms of said agreement, but the defendant refused and still refuses to accept the same and pay said purchase money or any part thereof. The plaintiffs therefore pray that said defendant be required to perform said agreement and pay plaintiffs the remainder of said purchase money, amounting to the sum of \$3,075, with interest from the first day of May, 1890, at the rate of eight per cent per annum, or in case of his refusal to complete said contract, that said premises be sold and the proceeds be applied to the payment of the sum due, and in case a deficiency the defendant be required to pay the same, and for such other relief as justice and equity may require."

The petition seems to state a cause of action. In *Mo-Williams v. Lawless*, 15 Neb., 131, it was held that a memorandum which shows the names of the parties, the

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description of the land sold, the price and general terms of the sale is sufficient, and the memorandum is only required to be signed by the party to be charged. (*Gartrell v. Stafford*, 12 Neb., 552; *Robinson v. Cheney*, 17 Id., 679.) The object of the statute of Charles II was to prevent frauds and perjuries. Thus, prior to that statute, a parol agreement for the sale of land, with formal delivery of possession, was sufficient. These things could be proved by witnesses of the transaction. This opened a wide field for false testimony. The statute therefore declared that no such contract was enforceable unless the party to be charged had signed a memorandum of the contract. Our statute embodies this feature of the statute of Charles II. In respect to the vendee, the common law remains as before the statute was passed. The acceptance of a memorandum by the vendee is evidence that he has accepted the contract and he is bound thereby. No objection is raised to the form of the judgment nor the judgment for a deficiency. The authority of the court to order a sale of the land instead of rendering a decree of strict foreclosure is undoubted. The parties are before the court and the subject-matter of the suit is within its jurisdiction, and the court may render such decree as may seem to comport with justice and right. In equity, the purchaser of an estate is treated as the owner, and the person holding the legal title as holding the same in trust for his use when he complies with the terms of the contract. The land itself appears to be the remainder of a governmental subdivision after a certain portion thereof had been platted and laid off into town lots, but in any event it is not claimed that the description is indefinite. The question whether a judgment for a deficiency may be recovered does not arise in the case, and will not be considered. As the proposed answer is, in effect, a denial, many of the matters set forth in the affidavits as to fraud in obtaining the judgment do not arise in the case, and if they did, the evidence being so nearly

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equally balanced, it would be impossible to say that the ruling of the trial court was wrong. Upon the whole case it is apparent that there is no reversible error in the record and the judgment is

AFFIRMED.

THE other judges concur.

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EDWARD CLAPHAM v. S. W. STORM.

FILED MARCH 29, 1893. No. 4625.

Review. Where the principal error relied upon is that the verdict is against the weight of evidence the verdict will not be set aside, unless it is clearly wrong.

ERROR from the district court of Madison county.
Tried below before **POWERS, J.**

J. R. Gilkeson and Wigton & Whitham, for plaintiff in error.

Holmes & Hays, contra.

MAXWELL, CH. J.

This is an action upon three promissory notes given by the defendant upon which there is claimed to be due to the plaintiff the sum of \$600. The defendant filed an answer to the petition as follows:

"1. The defendant, for answer to plaintiff's petition herein filed, admits the making and delivering to the payee therein named of the notes set out in said petition.

"2. The defendant denies each and every other allegation in said petition contained.

Clapham v. Storm.

"3. The defendant avers the facts to be that shortly prior to the 6th day of September, 1887, the defendant sold and conveyed by deed of general warranty to the plaintiff his farm, comprising 160 acres of land in Pierce county, Nebraska, at the agreed price as expressed in said deed of \$3,600; that as part consideration of the purchase of said premises the plaintiff assumed and agreed to pay certain incumbrances then existing against said premises, and for the balance of consideration of said purchase plaintiff sold to this defendant a large amount of stock, consisting of horses and cattle then on the plaintiff's farm in Saunders county, Nebraska, and then and there agreed that said stock should remain on said farm until the defendant could give sufficient notice of the public sale of said property at the plaintiff's farm aforesaid, and the plaintiff then and there agreed that he would purchase all notes at such sale at a certain agreed discount, to-wit, eight per cent, and at the same time the defendant further agreed to advance to the defendant on such sale notes the sum of \$600, to be used in paying the notes set out in plaintiff's petition, with the understanding that the said plaintiff should retain the said notes as security to him for the faithful performance of the defendant of his agreement to sell said property and turn over to the plaintiff the sale notes received at such sale to the amount of \$600 thus advanced by the plaintiff; that the plaintiff immediately filed his deed to the said property in Pierce county for record in the office of the clerk of said county and entered into possession of said premises; that he caused public notice to be given of the sale of the stock so as aforesaid purchased from the plaintiff, said sale to be had on the — day of October, 1887, at the premises of the plaintiff in Saunders county, Nebraska, and that he went to the premises of the plaintiff aforesaid at said time for the purpose of selling said property and carrying out and performing all the conditions of the agreement aforesaid on his part to be performed, but the plaintiff refused to deliver the said

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property, and has ever since refused to deliver the said property to this defendant, whereby the defendant was prevented from selling the said property and from the proceeds of the sale thereof returning to the plaintiff the money so advanced by him, and the residue of the property of the value of \$475 was wholly lost to this defendant, whereby this defendant has suffered damages in the sum of \$475. The defendant therefore prays that said note be declared canceled and he have judgment against the plaintiff for the said sum of \$475 and costs herein expended."

To this answer the plaintiff's amended reply is as follows:

"The plaintiff, for reply to defendant's answer, denies each and every allegation therein contained. Plaintiff alleges the fact to be that on or about the 6th day of September, 1887, the defendant sold and conveyed to plaintiff his farm of 240 acres of land in Pierce county, Nebraska. In consideration of said conveyance plaintiff assumed and agreed to pay all liens and incumbrances then existing against said land, and as a further consideration plaintiff sold and delivered to defendant certain stock and property, consisting of a wagon and a set of harness; that on or about the 24th day of September, 1887, plaintiff and defendant had a full settlement and stated an account of all matters in difference between them as to the sale and conveyance of said land, and the payment of the consideration therefor, and said account stated was that plaintiff was indebted to defendant in the sum of \$600, which plaintiff admits is still due defendant on said account stated. Plaintiff further alleges that in making said account stated the \$600 loaned by plaintiff to defendant as alleged in his petition was not included or considered."

On the trial the jury returned a verdict in favor of the defendant for the sum of \$375 at seven per cent. The court properly overruled the seven per cent, as the jury should have found the entire amount, and rendered judgment for

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\$375. The principal ground for a reversal relied upon is that the verdict is against the weight of evidence.

The testimony tends to show that the defendant sold a farm of 240 acres in Pierce county to the plaintiff for the sum of \$3,600; that the plaintiff assumed an incumbrance on the land for \$2,000 and was to pay the remaining consideration in stock on the plaintiff's farm in Saunders county. The defendant contends that the plaintiff guaranteed this stock to bring at public sale the sum of \$1,600; that the defendant in pursuance of the contract offered a part of the stock for sale and sold sufficient to amount to \$775.25, and the remainder of the stock is retained by the plaintiff. The plaintiff does not deny that a portion of the stock is unsold in his hands, but claims that the defendant agreed to take the stock at a price agreed upon, and that if he sold the same for less the loss must fall upon him, and this is the principal contention in the case. The defendant, it appears, was in embarrassed circumstances, and the plaintiff, after he received a deed for the land and had assumed the mortgage, etc., complained that he had paid too much for the land, whereupon the defendant admits that he said to him, in effect, that if he would guarantee the stock to bring \$1,600 that he would throw off \$600, the defendant also to have the right to redeem the property within a certain time. The testimony before the jury on this point would warrant them in finding that the plaintiff had not complied with the terms of the alleged agreement—if it had any validity, which we doubt. There is also proof that after the sale of the cattle the parties spent a day in attempting to settle the controversy, but being unable to do so it was submitted to the wife of one of the parties, who computed that there was due the defendant the sum of \$26, but that the plaintiff would only pay thereon the sum of \$16. It also appears that the plaintiff sold the farm in question for the sum of \$3,600. This, perhaps, is not material. The mortgage and judgment liens on the

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farm exceeded \$2,400. These the jury deducted from the purchase price of the farm. They also evidently deducted \$600 advanced by the plaintiff to the defendant, and \$175.25 paid to Mr. Hicks. These several sums deducted from the purchase price of the farm, viz., \$3,600, leave a sum in excess of the verdict. This question is one proper to submit to a jury and in our view the verdict is right and should not be disturbed. It is unnecessary to review the instructions as they seem to conform to the proof. The judgment is

AFFIRMED.

THE other judges concur.

 ART ELIZA ALEXANDER V. JOHN OVERTON ET AL.

 36 503
 52 283

FILED MARCH 29, 1893. No. 4359.

Action for Wrongful Sale of Land by County Treasurer:

PROPER PARTY PLAINTIFF: HOLDER OF LEGAL TITLE. One M. purchased certain lands at tax sale and had the certificates and deeds made to one A., his sister. He testified that he had money belonging to her to invest and that he purchased the property in question. It was sought to impeach this testimony by showing that after the purchase he had made statements that on account of domestic difficulties he had taken the title in the name of his sister. *Held*, That as the money paid purported to be that of the sister and the titles were taken in her name she could maintain an action against the county treasurer and his sureties for the wrongful sale of the property.

ERROR from the district court of Otoe county. Tried below before CHAPMAN, J.

C. W. Seymour, for plaintiff in error.

John C. Watson, contra.

MAXWELL, CH. J.

This is an action upon four causes of action against the defendant and sureties on his official bond, for a wrongful sale of lands, as treasurer of Otoe county, to plaintiff; in other words, for selling lands where no title could pass by the sale. The answer is, prior adjudication, and that the plaintiff is not the real party in interest. On the trial of the cause the jury returned a verdict for the defendants, upon which judgment was rendered. The verdict is conceded to have been rendered for the defendants on the ground that the plaintiff was not the real party in interest. It appears from the testimony that the plaintiff is a sister of W. D. Merriam. It also appears that he purchased the lands in question and transacted all the business. Merriam testifies that he had money belonging to the plaintiff to invest and that he did so by purchasing the land in question for the plaintiff. We find no testimony contradicting this, but many witnesses testify that in a conversation they had with Merriam after these investments were made he stated in effect that he in fact had made the purchases for himself at tax sale but had taken the title in the name of his sister, and one witness testifies that he gave as a reason for so doing that he had had some family difficulty. Now, suppose all that proved as to statements of Merriam is true, it would not follow that he was the real party in interest. Leaving out of view the fact that the statements of an agent made after the transaction are not admissible against his principal, they are not sufficient to defeat the action. If the money invested in fact belonged to the plaintiff, the action could be prosecuted in her name, and the same is true if it was invested in her name. Suppose a brother should take the title to a tract of land in the name of his sister—the deed being made to her, will it be seriously contended that an action of ejectment could not be maintained in her name to

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recover the possession? In law she would hold the legal title and would be the real party in interest. The common law did not recognize assignments of claims. They were supposed to foster litigation which in theory the common law did not favor. Hence if it was sought to bring an action on an assigned claim it was to be done in the name of the original party. The reason for this rule is stated in *Lampet's Case*, Coke's Rep. [Eng.], part 10, p. 48, as follows: "The great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people and chiefly of terre-tenants, and the subversion of the due and equal execution of justice." (*Warmstrey v. Tanfield*, 1 Rep. Ch. [Eng.], 29*; *Wright v. Wright*, 1 Ves. Sr. R. [Eng.], 411; *Mandeville v. Welch*, 5 Wheat. [U. S.] 283; *Bacon v. Bonham*, 33 N. J. Eq., 614; *East Lewisburg Lumber Mfg. Co. v. Marsh*, 91 Pa. St., 96; *Kountz v. Kirkpatrick*, 72 Id., 376; *Trull v. Eastman*, 3 Met. [Mass.], 121B; *ispham's Eq.*, 214.)

The case of *Thalimer v. Brinkerhoff*, 20 Johns. [N. Y.], 386, decided by a divided court, seems to be one of great hardship where, under the forms of law, a party was robbed of his property on the ground that, as assignor, he had contributed to the expenses of maintaining an action. In equity the assignee of a chose in action may maintain an action in his own name. In the case at bar, however, there has not, so far as appears, been any assignment. The tax deeds were taken in the name of the plaintiff, and an action is now brought in her name to recover for the wrongs perpetrated by the defendant in selling the lands. The plaintiff holds the legal title to this claim. There is no claim that the prosecution of the action in her name will defraud the defendant or any one else. A judgment on this claim, either for her or against her, will be ample pro-

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tection to the defendant. If the claim was assigned to Merriam, or any one else, it might be insisted that he was not the real party in interest, and it might be necessary to bring in the assignor as a witness to determine that question, but it does not arise in this case. Here the contract purports to have been made with the plaintiff, and the money was paid in her name. The contract relations that may exist between herself and Merriam do not arise in this case and need not be considered.

Section 30 of the Code provides: "The assignee of a thing in action may maintain an action thereon, in his own name and behalf, without the name of the assignor."

Section 31: "In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith, and upon good consideration before due."

Section 32: "An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

The contract in the case at bar purports to have been made by the plaintiff, and the deeds were made in her name, and she is authorized to bring the action. The judgment is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

36	507
55	287
36	507
57	203

SECURITY COMPANY OF HARTFORD, CONNECTICUT, AP-
PELLANT, v. BENJAMIN F. EYER ET AL., APPELLEES.

FILED MARCH 29, 1893. No. 4788.

1. **Negotiable Instruments: VALIDITY OF PROVISIONS FOR PAYMENT OF ATTORNEY'S FEE.** Following the repeated decisions of this court it was *held*, that a provision in a note executed since June 1, 1879, the date of the taking effect of the act repealing the attorney fee law, stipulating for the payment of an attorney's fee to the plaintiff for instituting and prosecuting a suit on the note, is invalid.
2. ———: **FORECLOSURE OF MORTGAGE: CONFLICT OF LAWS: LEX FORI.** B. F. E., a resident of Nebraska, for the purpose of procuring a loan of money, on July 9, 1886, executed a note in this state, and secured the payment thereof by mortgage on real property within the state. The payee and mortgagee was a resident of Iowa, but the papers were executed and delivered, and the money was paid to the borrower, in this state. The note, by its terms, was payable in New York City, and contained a provision to the effect that in case an action is commenced to foreclose the mortgage securing the same, plaintiff should be allowed by the court in the decree an attorney's fee of \$70, which provision was valid and binding in the state of Iowa. The note and mortgage each contained a clause expressly providing that "they are made and executed under and are in all respects to be construed by the laws of the state of Iowa." *Held*, In a suit to foreclose the mortgage, that the law of the place of the forum governs the application of the remedy, such as the recovery of costs, etc., and that the said provision in the note for attorneys' fees, being contrary to the settled law of this state, will not be enforced.
3. **Mortgage Foreclosure: CONTRACT: INTERPRETATION.** The contract set out at length in the opinion construed, and *held* that the promise of T. D. and the bank to pay off and discharge the incumbrances on the real estate covered by plaintiff's mortgage was not absolute, but conditional.
4. ———: **DEFICIENCY JUDGMENT.** *Held*, Under the pleadings and proofs in the case, that plaintiff is not entitled to a deficiency judgment against the said T. D. and the bank.

APPEAL from the district court of Holt county. Heard below before KINKAID, J.

Breckenridge, Breckenridge & Crofoot, for appellant:

A promise in a note to pay attorneys' fees is valid and may be enforced where suit is brought upon default in payment. (*Harvey v. Baldwin*, 24 N. E. Rep. [Ind.], 347; *Reisterer v. Carpenter*, Id., 371; *Smock v. Ripley*, 62 Ind., 81; *Ogborn v. Eliason*, 77 Id., 394; *Smith v. Silvers*, 32 Id., 321; *Farmers & Merchants National Bank v. Barton*, 21 Ill. App., 403; *Barry v. Guild*, 28 Id., 50; *Wood v. Winship Machine Co.*, 83 Ala., 424; *Williams v. Flowers*, 7 So. Rep. [Ala.], 439; *Boutwell v. Steiner*, 5 Am. St. Rep. [Ala.], 376; *Peyser v. Cole*, 4 Pac. Rep. [Ore.], 520; *Wilson Sewing Machine Co. v. Moreno*, 6 Sawyer [U. S.], 35; *Bank of British N. A. v. Ellis*, Id., 96; *Miner v. Paris Exchange Bank*, 53 Tex., 561; *Washington v. First National Bank of Denton*, 64 Id., 4; *Md. Fertilizer & Mfg. Co. v. Newman*, 45 Am. Rep. [Md.], 750; *Bowie v. Hall*, 69 Md., 433.) A reasonable attorney's fee may be stipulated for in a mortgage and collected in case of foreclosure. (*Casler v. Byers*, 22 N. E. Rep. [Ill.], 507; *Telford v. Garrels*, 24 Id. [Ill.], 573; *McIntire v. Yates*, 104 Ill., 492; *Clawson v. Munson*, 55 Id., 394; *Succession and Community of Duhe*, 6 So. Rep. [La.], 502; *Levy v. Beasley*, Id. [La.], 630; *Alden v. Pryal*, 60 Cal., 215; *Moran v. Gardemeyer*, 23 Pac. Rep. [Cal.], 6; *Snow v. Warwick*, 20 Atl. Rep. [R. I.], 94; *Rice v. Cribb*, 12 Wis., 198; *Hitchcock v. Merrick*, 15 Id., 578; *Killips v. Stephens*, 40 N. W. Rep. [Wis.], 652; *Williams v. Meeker*, 29 Ia., 292; *McGill v. Griffin*, 32 Id., 445; *McIntire v. Cagley*, 37 Id., 676; *Davidson v. Vorse*, 52 Id., 384; *Cox v. Smith*, 1 Nev., 161; *McLane v. Abrams*, 2 Id., 199; *Rickards v. Hutchinson*, 18 Id., 215; *American Mortgage Company v. Downing*, 17 Fed. Rep., 660.) A creditor taking security of any kind for

debt may include a stipulation that he may recover with it the reasonable expenses for collection, including attorney's commission. (*McAllister's Appeal*, 59 Pa. St., 204; *Imler v. Imler*, 94 Id., 372; *Huling v. Drexell*, 7 Watts [Pa.], 126.)

H. M. Utley, contra:

The provision of the contract for the payment of attorneys' fees is void. (*Dow v. Updike*, 11 Neb., 95; *Hardy v. Miller*, Id., 395; *Otoe County v. Brown*, 16 Id., 395; *Bond v. Dolby*, 17 Id., 493; *Hand v. Phillips*, 18 Id., 593; *Winkler v. Roeder*, 23 Id., 706; *Bullock v. Taylor*, 39 Mich., 140; *Myer v. Hart*, 40 Id., 522; *First National Bank of Trenton v. Gay*, 63 Mo., 33; *Ayrey v. Fearnside*, 4 Mees. & W. [Eng.], 168; *Smith v. Nightingale*, 2 Stark. [Eng.] 375; *Bolton v. Dugdale*, 4 B. & Ad. [Eng.], 619; *Smith v. Mercer*, 1 Marsh. [Eng.], 253; *Clarke v. Percival*, 2 B. & Ad. [Eng.], 660; 1 Parsons, Notes & Bills, 37; *Read v. McNulty*, 12 Rich. L. R. [S. Car.], 445; *Woods v. North*, 84 Pa. St., 407; *Witherspoon v. Musselman*, 14 Bush [Ky.], 214; *Thomasson v. Townsend*, 10 Id., 114; *Gaar v. Louisville Banking Co.*, 11 Id., 189; *Smith v. Shelden*, 35 Mich., 42; *Merchants National Bank v. Sevier*, 14 Fed. Rep. [Ark.], 662; *Shelton v. Gill*, 11 O., 417; *Martin v. Trustees Belmont Bank of St. Clairsville*, 13 Id., 250; *Jones v. Radatz*, 11 Cent. L. J. [Minn.], 513; *Loudon v. Taxing District*, 104 U. S., 771; *State v. Taylor*, 10 O., 381.)

NORVAL, J.

This action was brought by the plaintiff and appellant in the district court of Holt county for the foreclosure of a mortgage on the N. W. $\frac{1}{4}$ of section 15, town 28, range 13 west, executed by Benjamin F. Eyer and Hattie S. Eyer, his wife, on the 9th day of July, 1886, to secure the payment of a bond or note given by said Benjamin F.,

calling for the sum of \$700 with seven per cent interest from date thereof. To the action, C. H. Toncray, George W. E. Dorsey, the Farmers & Merchants National Bank of Fremont, and others were made defendants. A decree of foreclosure was rendered in an amount satisfactory to the plaintiff.

Two questions are raised by the appeal:

1. Was the plaintiff entitled to an allowance of an attorney's fee and to have the same taxed as costs in the case?
2. Did the court below err in holding that Toncray, Dorsey, and the bank were not personally liable to the plaintiff for the payment of the mortgage debt?

The note and mortgage each contained a provision to the effect that, in case an action is commenced to foreclose the mortgage, the plaintiff shall be allowed by the court in the decree an attorney's fee of \$70.

Counsel for plaintiff, in the brief, cite a long line of decisions from the courts of last resort of several of our sister states which hold that a stipulation in a mortgage like the one before us for the payment of an attorney's fee, in the event of an action being instituted to foreclose the same, is valid and binding. This court in repeated decisions has held, and it is now the settled law of this state, that stipulations of this character found in contracts executed since June 1, 1879, the date of the taking effect of the act repealing the attorneys' fees statutes, are invalid and will not be enforced. (*Dow v. Updike*, 11 Neb., 95; *Hardy v. Miller*, Id., 395; *Otoe Co. v. Brown*, 16 Id., 395; *Winkler v. Roeder*, 23 Id., 706.) The question being no longer an open one we shall not now attempt to examine the subject anew, or to review the authorities which hold a different view from the one enunciated by this court in the cases cited above. If the rule is changed in this state it should be by statute, and not by judicial decision.

But it is contended by counsel for plaintiff that the note and mortgage were executed in the state of Iowa and must

be enforced according to the laws of that state, which authorize the allowance of attorney fees in foreclosure cases, where such fees are contracted by the parties. The record shows that when the mortgage was executed the mortgagee, Clarence K. Hesse, was a resident of Iowa and that the mortgagors resided in this state, on the land covered by the mortgage. Burnham, Tulleys & Co., of Council Bluffs, were the agents of the mortgagee and negotiated the loan for him through their sub-agent, John L. Pierce, a resident of Norfolk, this state. The papers were drawn in Iowa and sent here for execution. The note is headed at Council Bluffs and purports to have been dated and signed there. By its terms it is payable at the Banking House of Gilman, Son & Co., New York City. The uncontradicted testimony shows that the papers were executed and delivered in Nebraska. The mortgage was acknowledged in Holt county on January 9, 1886, and was filed for record in the forenoon of the same day, so it could not have been delivered in Iowa before it was placed on record. It also appears that the money was paid on the loan to the borrower in Nebraska through said John L. Pierce.

Bishop on Contracts, sec. 1389, says that "When the preliminaries of a contract and its formal execution have occurred partly in each of two or more states, its place of making is, as a sort of general rule, that at which, by delivery or otherwise, it first becomes a contract. For example, since ordinarily it is delivery which gives effect to the writing, a contract is commonly deemed to have been made in the state where the delivery took place, without reference to where it was written and signed. But in many cases this rule is inadequate, or its pointings are not readily understood; then the court will look into the preliminaries, the surroundings of the parties, their domicile, the words, the nature of the contracting, and the like, from which combined whole it will deduce the result."

There can be no doubt, under the rule just stated, that

the evidence fixes Nebraska as the *locus contractus*. The contract having been made in this state, if that fact alone is to be considered, it is clear that the agreement to pay an attorney's fee would have to be held invalid, for, as a general rule, where there is no stipulation to the contrary, the *lex loci contractus* governs. Of course it is competent for parties to contract with reference to the law of a particular place. Thus, where the place of performance of a contract is different from the place of making, the parties may stipulate that the contract shall be governed by the law of either place. Although New York city, in the state of New York, is mentioned in the note as the place of payment, the contract is not to be construed with reference to the law of that state, for the obvious reason there is no averment in the petition that the parties agreed or intended that the place of payment was in the state of New York, nor is the statute of that state pleaded. The note and mortgage both contained a printed clause expressly providing that "they are made and executed under and are in all respects to be construed by the laws of the state of Iowa."

It is urged that under the quoted stipulation the decree of the district court should have provided for an attorney's fee, in accordance with the contract of the parties, since the laws of Iowa, at the time of the making of the note and mortgage, allow attorneys' fees, when stipulated for in the contract. The books abound with decisions to the effect that parties may stipulate that either the law of the place of making the contract, or the place of performance, shall be applied by the courts in the construction of the contract and that such stipulation is binding upon the parties; but no case has been cited by counsel for appellant, nor have we been able to find any, which holds that a provision in a contract like the one before us, providing that it shall be construed by the laws of a state other than that of the one where the contract is made, or in which it is to be performed, will govern and control. We shall

not now decide the force and effect of such provision, since its determination is not essential to a proper disposition of the question under consideration; but for the purposes of this case we shall assume that the mortgage was an Iowa contract and the law of that state governs as to its construction. But it by no means follows, because the clause in the note and mortgage in regard to attorneys' fees is valid in Iowa, that the stipulation can be enforced in this state. Attorneys' fees, in states where they are allowed by the court to the successful party, are in the nature of costs and are taxed and treated as such. They are no part of the judgment proper. (*Rich v. Stretch*, 4 Neb., 186; *Hendrix v. Rieman*, 6 Id., 516; *Heard v. Dubuque County Bank*, 8 Id., 10; *Rosa v. Doggett*, Id., 51; *Hand v. Phillips*, 18 Id., 593; *State v. Boyd*, 52 N. W. Rep. [Ia.], 513.)

In general, costs are recoverable only by force of some statutory provisions, and the law of the place of the forum in respect to costs is applied. The law in force at the place the contract is made does not govern costs. (*Commercial National Bank of Ogden v. Davidson*, 22 Pac. Rep. [Ore.], 517.) The case cited was an action brought in one of the circuit courts of the state of Oregon to foreclose a chattel mortgage on property within said state, given to secure a note made out of that state. The note contained a clause that "if not paid at maturity, ten per cent additional as costs of collection" should be recovered, which provision was valid and enforceable in the state where the note was executed. The court held that the *lex fori* governs the application of the remedy, and that the stipulation for attorneys' fees, being contrary to the public policy of the state of Oregon, would not be enforced by the courts of that state. The following quotation is from the opinion in the case: "As a general rule, the law of the place where contracts merely personal are made governs as to their nature, obligation, and construction. But I do not think that rule

applies to an extraneous agreement, the obligation of which does not arise until a remedy is sought upon the contract, to which it is only auxiliary. In regard to such agreements, the law of the place where they are attempted to be enforced, I should suppose, would prevail. This agreement was to pay the additional percentage as costs for collection of the note, and if the courts where the note was executed would have enforced the agreement, it does not follow that the courts of another jurisdiction are bound to do so. The effect of the agreement was to provide for an increase of costs, which are only incidental to the judgment, and the allowance of which must necessarily depend upon the law of the forum. A stipulation in a note made in Utah territory, providing that in an action on the note the plaintiff, in case of a recovery, should be entitled to double costs, might be considered valid under the laws of that territory, and enforceable in its courts; but that certainly would not render it incumbent upon the courts of this state, in an action upon such note, to award double costs."

In our opinion, the clause in the note and mortgage in the case at bar, relating to attorneys' fees, is invalid, and the court below did right in not enforcing it.

As to the remaining question involved in this appeal, the record before us shows that a few days after the making and recording of the mortgage in suit the mortgagors conveyed the land therein described, and other lands, by warranty deed to one Augusta Elwood; that on August 19, 1887, said Augusta Elwood and her husband, by warranty deed, conveyed the land to George Burke, who by quitclaim deed conveyed the property to George W. E. Dorsey on March 29, 1888, and that Elwood and wife also executed a quitclaim deed to the real estate to C. H. Toncray on April 12, 1889. It further appears that the said Elwoods executed and delivered mortgages upon the same lands as follows: On March 1st, 1887, two mortgages to the Farmers Loan & Trust Company to secure the sums

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of \$24,000 and \$9,460 respectively; on April 21, 1887, a mortgage to the Oregon Horse & Cattle Company for the sum of \$18,023; on April 28, 1887, a mortgage to C. H. Toncray for \$11,516.70, and on July 2, 1888, another mortgage to Toncray for \$8,000.

On the 6th day of April, 1888, the following contract was entered into between S. H. Elwood and Toncray, Dorsey, and the bank:

"This agreement, made this 6th day of April, 1888, by and between C. H. Toncray, George W. E. Dorsey, the Farmers & Merchants National Bank, and S. H. Elwood, witnesseth: That whereas said Elwood has been engaged in various deals for several years, in which deals said Elwood has borrowed money, and said Toncray and Dorsey have settled and assumed the same, and whereas said Elwood has given various mortgages, both on real and personal property, to said Toncray and said bank, and whereas said Elwood has purchased large quantities of land for said Toncray and Dorsey in Holt county, for which lands and services said Elwood was to receive all sums over the mortgages on said lands for what said lands were sold:

"Now, this agreement witnesseth, that said Elwood hereby releases said Dorsey and Toncray from any and all claims by reason of such purchases, and from all claims and demands of whatsoever kind and description up to this date, and said Toncray, Dorsey, and said bank agree to, and do hereby, release said Elwood, and said Elwood's wife, from any and all claims, notes, demands of any kind or nature, except one note hereafter stated, now due them, or either of them, and agree to deed to said Elwood his home place, consisting of seven hundred and twenty acres, and to clear the same from all incumbrances out of the proceeds of the last three quarter sections purchased by Elwood, when the money shall be received therefrom.

"And said Toncray, Dorsey, and said bank hereby re-

lease, sell, and make over to said Elwood all the cattle, horses, and agricultural implements on said home place, or handled on said place, except 167 steers, which said Elwood agrees to handle for said Toncray without charge for his personal supervision. The home place above described, being the north half of section 22, and the northwest quarter of the southwest quarter of section 23, and the northwest quarter of section 15, and the south half of the northeast quarter of section 10, and the southwest quarter of the southwest quarter of section 11, township 28, range 13, in Holt county, Nebraska.

"The note excepted from this agreement is a note of \$12,000, made by Mrs. Elwood in December or November, 1888, but said Elwood may pay said note by services in securing land on the same terms as heretofore. This agreement being a full and complete settlement of all claims, demands, notes, bills, or accounts existing between the parties hereto, or any claims of any kind or nature, and all evidences of debt are to be surrendered and cancelled."

This contract was duly signed by the parties therein named and was afterwards, on the 25th day of June, 1888, duly recorded.

Plaintiff insists that by virtue of the foregoing agreement he was entitled to a finding that Toncray, Dorsey, and the bank were liable for the payment of the amount due on its mortgage. The allegations in the petition under which plaintiff bases its claim to a deficiency judgment against the three parties in case the mortgaged premises do not bring enough to pay the mortgage debt are to the effect that Toncray, Dorsey, Elwood, and the bank, subsequent to the execution of the mortgage in said petition described, acquired title to the premises, or some interest therein, and as a part of the purchase price thereof, and in further consideration of some agreement between themselves, the said Toncray, Dorsey, and the bank agreed to pay all liens

upon the property, including the debt secured by plaintiff's mortgage.

There is absolutely no evidence in the bill of exceptions conducing to prove that either Toncray, Dorsey, or the bank assumed the payment of the mortgage as part consideration for the land. Neither of them at the time of making the agreement was purchasing the land, but, on the other hand, the legal title thereto was then in Dorsey, and the three parties, by the agreement under consideration, obligated themselves to deed certain lands, including the 160 acres herein involved, to Elwood, and upon certain conditions they promised to pay the incumbrances thereon. It does not appear that the quarter section has ever been conveyed to Elwood.

Upon the trial, some oral testimony was introduced tending to show that it was not within the contemplation of the parties, when the agreement was made, to include plaintiff's mortgage. Whatever may have been the actual intention of the parties in that respect, the language used is certainly broad enough to include this incumbrance.

It will be observed, however, that the agreement to pay the incumbrances on the property is not absolute, but conditional. The provision of the contract is that said Toncray, Dorsey, and said bank agree to and do hereby release said Elwood "from any and all claims, notes, demands of any kind or nature, except one note hereafter stated, now due them or either of them, and agree to deed said Elwood his home place, consisting of 720 acres, and to clear the same from all incumbrances *out of the proceeds of the last three quarter sections purchased by Elwood when the money shall be received therefrom.*" The parties only agreed to pay the liens from money thereafter to be derived from the sale of certain lands. There is no averment in the petition, nor is there a particle of proof tending to establish, that any part of the three quarter sections has been sold. For these and other reasons that might be stated these parties

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are not as yet liable under the terms of said contract to pay the mortgage debt to plaintiff, and no recovery can be had against them thereunder. The decree of the court below is

AFFIRMED.

THE other judges concur.

GEORGE O. YEISER V. S. W. FULTON ET AL.

FILED MARCH 29, 1893. No. 4358.

Action on Note: USURY: EVIDENCE. *Held*, That the evidence sustains the plea of usury, and that the plaintiff was entitled to recover a sum equal to the amount of money loaned, less \$11.25 paid by the defendant as interest.

ERROR from the district court of Webster county. Tried below before GASLIN, J.

John O. Yeiser and G. R. Chaney, for plaintiff in error.

Case & McNeny, contra.

NORVAL, J.

This action was brought by George O. Yeiser on a promissory note for the sum of \$250, executed by S. W. Fulton, Everett Harrison, and W. C. Richardson. The petition is in the usual form. The answer of the defendant Fulton sets up the defense of usury, alleging that he had paid the sum of \$85.25 as usurious interest on the note. For reply the plaintiff admits that he charged and received \$11.25 usurious interest, and denies each and every allegation contained in the answer of Fulton. The other two defendants, Harrison and Richardson, filed an answer alleging that they signed the notes merely as sureties for their

co-defendant Fulton. The cause was tried to a jury, who returned a verdict for the plaintiff for \$164.75, and judgment was rendered thereon. The plaintiff prosecutes error, alleging that the verdict is not supported by the evidence.

The facts are undisputed and are briefly stated as follows: The defendant Fulton borrowed, at what date the record fails to disclose, the sum of \$500 of the Farmers & Merchants Banking Company of Red Cloud, on ninety days' time, and agreed to and did pay, for the use of the money, interest at the rate of one and a quarter per cent per month. He renewed the note from time to time, the bank charging him interest at one and a half per cent a month, which was paid by the defendant. Finally Fulton paid all the interest and \$250 on the principal, and gave a new note for \$250, upon which the defendant agreed to and did pay interest at the rate of two per cent a month. The total amount of interest paid the bank on the loan is \$74. After the last renewal note became due, Fulton wrote the bank asking that the time of payment be extended, to which Mr. Garber, the cashier of the bank, sent the following letter in reply:

"FARMERS & MERCHANTS BANKING CO.

"Capital, \$50,000. Stockholders' Liability, \$100,000.

"RED CLOUD, NEB., Sept. 15, 1888.

"*S. W. Fulton, Bladen, Neb.*—DEAR SIR: Replying to yours of the 13th inst., we do not feel like renewing your note again after your definite proposition to settle, made us May last. We appreciate your misfortune, and have taken steps looking to your receiving the amount at, I think, a less rate of discount than we can grant. G. O. Yeiser has money at present. I have told Mr. Yeiser that you want \$250 and will give Everett Harrison and W. C. Richardson as security, and have recommended it as first class paper. If Mr. Yeiser grants you the loan you can intrust him to take your note up with us with the proceeds

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of the loan and remit the canceled note to you. Your note and interest amounts to \$255.37, if paid by the 20th.

"Yours truly, W. S. GARBER, *Cashier.*"

The plaintiff also wrote Mr. Fulton a letter, of which the following is a copy :

"RED CLOUD, NEB., Sept. 15, 1888.

"*S. W. Fulton, Bladen, Neb.*—DEAR SIR: Mr. W. S. Garber has just spoken to me to loan you \$250. I have drawn a note for you to sign. Have Everett Harrison and W. C. Richardson also sign with you. I will charge you 1½ per month. Please send draft for discount, \$11.25, with note signed, to Farmers & Merchants Bank, where I do my business, and it will receive immediate attention.

"Truly, GEO. O. YEISER."

With the letter was enclosed the note in suit, which, after being signed by the defendants, was returned to the plaintiff. The defendant Fulton also at the same time sent a draft to the plaintiff for \$11.25, as interest on the \$250 loan for ninety days. No other payment thereon was ever made. On the receipt of the note by Yeiser, he paid off the defendant's note held by the bank. It is also stipulated in the record that Yeiser was one of the directors of the bank at the time it made the loan to the defendant, and also at the time of the several renewals thereof, and knew that usurious interest was collected by the bank on such renewals.

It appears from the special findings returned by the jury that they decided the case upon the theory that the note in suit was taken in plaintiff's name, in pursuance of some arrangement or agreement entered into between him and the officers of the bank, as a shift or device for the purpose of evading the usury laws of the state, and that the bank was in fact the owner of the note. It is patent that the verdict could not have been reached upon any other theory, inasmuch as by deducting from the face of the note the sum of \$85.25, which is the aggregate amount of in-

terest paid by Fulton to both the bank and the plaintiff, leaves \$164.75, the exact sum assessed by the jury. There is no dispute but that the note given to the plaintiff is tainted with the vice of usury, and it was proper for the jury to apply on the principal the sum of \$11.25 which, was paid by the defendant as interest on the note; but the evidence did not justify the jury in also deducting the amount of interest which the defendant had paid to the bank on a usurious loan obtained from it. There is not to be found in the record sufficient evidence upon which to base a conclusion that in the taking of the note in question there was any collusion between the plaintiff and the bank, or that the note was taken in Yeiser's name for the purpose of escaping the penalty for taking usurious interest.

We have no right to presume that the intention of the parties was to evade the law. It is reasonable to suppose, if the object in taking the note in the name of Yeiser was merely a device to avoid the defense of usury, that the plaintiff would not have written to the defendant as he did, proposing to charge the defendant on the loan a greater rate of interest than the maximum allowed by law. The evidence shows that the money was actually loaned by the plaintiff in good faith for the purpose of paying defendant's note at the bank and that the money was so applied. The fact that Yeiser was a director in the bank, and loaned Fulton the money to pay his usurious debt to the bank, which was known by the plaintiff at the time to be usurious, is not alone sufficient to authorize the defendant to set up as a defense to this action the usurious transaction between himself and the bank.

The plaintiff under the evidence was entitled to recover the sum of \$238.75, without costs. The judgment of the court below is reversed and the case remanded.

REVERSED AND REMANDED.

THE other judges concur.

JAMES H. McMURTRY, APPELLANT, V. WILLIAM KEIFNER ET AL., APPELLEES.

FILED MARCH 29, 1893. No. 4910.

1. **PARTITION: NOT MAINTAINABLE BY PARTY OUT OF POSSESSION.** A party out of possession of real estate, whose title is denied, cannot maintain an action of partition against one in possession, claiming title to said land. (*Seymour v. Ricketts*, 21 Neb., 210.)
2. ———: **RECITALS IN DEED: PROOF OF DEATH.** A recital in a deed of recent date, that the grantors are the heirs at law of a former owner of the lands therein described, is not sufficient evidence, as against a stranger to the instrument, of the death of the supposed ancestor, or that the persons who executed the deed are his heirs.

APPEAL from the district court of Lancaster county.
Heard below before HALL, J.

Abbott, Selleck & Lane, for appellant.

Lamb, Ricketts & Wilson, contra.

NORVAL, J.

This was an action brought by the appellant for the partition of real estate. Plaintiff, in his petition filed in the district court, alleges that he is the owner of an undivided one-half interest in the lands in dispute, and that the defendant William Keifner is the owner of the other undivided one-half interest thereof; that the defendant J. R. Richards, as trustee for the defendant State Loan & Trust Company, has a mortgage heretofore executed by the defendant Keifner upon his interest in the premises, to secure the payment of \$800, due July 1, 1893.

The defendant Keifner alone answered: First—By a general denial. Second—That he and his grantors have been in the open, notorious, exclusive, adverse possession

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of the premises as owner for more than ten years next before the bringing of the suit, and that the said defendant has such possession at the present time.

The reply of the plaintiff denies every allegation of the answer.

The district court, on the trial, found the issues against the plaintiff, and dismissed the action.

The undisputed testimony shows, and the trial court so found, that the defendant Keifner was at and for some time prior to the bringing of this suit in the exclusive possession of the entire tract described in the petition, claiming the legal title to the lands. McMurtry has never been in possession of the premises, and his title being denied by the defendant, the plaintiff cannot maintain a suit in partition until he has established his title by an action at law. This doctrine was affirmed in *Seymour v. Ricketts*, 21 Neb., 240, where the authorities are collated.

Another reason why the court did not err in dismissing the petition is that the plaintiff failed to prove by any competent evidence that he had any interest in the lands sought to be partitioned. It is conceded that the title to the premises in dispute was originally in Catherine Tozier. The defendant Keifner claims title from her through the following conveyances: Catherine Tozier to John B. Phinney and James F. Phinney, warranty deed, dated May 8, 1869, recorded June 19, 1869; John B. Phinney and Mary A., his wife, to Albert G. Guthridge, warranty deed, dated June 29, 1869, covering the entire tract, which deed was recorded on the 26th day of July, 1869; Albert G. Guthridge and wife to S. C. Head, warranty deed for all the lands, dated August 13, 1869, recorded on the 18th day of the same month; S. C. Head to Samuel P. Axtell, warranty deed embracing the lands in controversy, dated May 23, 1872, recorded on the 22d day of August, 1872; Samuel P. Axtell to Frances Morrison, warranty deed, dated July 22, 1872, recorded August 22, 1872; Frances Morrison

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and John P. Morrison, her husband, to the defendant William Keifner, warranty deed to the entire tract, bearing date August 2, 1886, and filed for record on the 29th day of December, 1886.

It will be observed that the chain of title to the property is continuous from Catherine Tozier to the defendant Keifner with the exception that there is no deed of the undivided one-half thereof from James F. Phinney to John B. Phinney.

The defendant insists, and he introduced on the trial in the court below some testimony tending to show, that the one hundred and sixty acre tract which embraced the lands in controversy, and which quarter section was conveyed by Catherine Tozier to John B. Phinney and James F. Phinney by the deed of May 8, 1869, was divided by the said Phinneys, John B. taking the part including these lands and James F. receiving the other portion, and that mutual deeds were made between them of their respective allotments, but that the deed from James F. Phinney to John B. Phinney for these lands is lost and cannot be found, and that through oversight and neglect it was never recorded. It is not our purpose to determine whether or not the evidence is sufficient to establish that John B. ever acquired the interest of James F. in the property, nor is it necessary that we should do so. It is uncontradicted that the defendant Keifner has a perfect title to at least an undivided one-half of the premises. Unless the plaintiff owns the other moiety, he has no interest in the lands, and therefore would not be entitled to a partition thereof.

The plaintiff, for the purpose of showing that he acquired the undivided one-half of the property in question, which was formerly owned and held by said James F. Phinney, introduced in evidence a quitclaim deed from Adeline Phinney, Lauren P. Phinney, Ella Phinney, Mary E. Phinney, John S. Phinney, and Sarah A. Phinney to James H. McMurtry, conveying to him all their

right, title, and interest to the lands, which deed was executed on the 26th day of June, 1888. This deed contained a recital stating that the grantors therein named were the sole heirs at law of James F. Phinney, deceased. No evidence was introduced in the cause outside of said recital in the deed that tended to prove that James F. Phinney, the former owner of the lands, was dead, or that the persons who executed said conveyance were his heirs. The question is squarely presented to the court for consideration, whether the said recital alone is sufficient proof, as against the defendant Keifner, of the death of said James F. Phinney, or of the heirship of the grantors in the deed. The general rule is that a recital in a deed is only evidence against the parties to it and their privies. It is not binding upon strangers, or those who claim through a paramount title.

It has been held that recitals in ancient deeds are presumptive evidence of pedigree. (*Bowser v. Cravener*, 56 Pa. St., 132; *Scharff v. Keener*, 64 Id., 376; *Little v. Palister*, 4 Greenl. [Me.], 209.) But a recital contained in a deed of a recent date that the grantors are heirs at law of a former owner is insufficient proof, as against a stranger to the conveyance, of the death of such previous owner, or that the persons who executed the deed are in fact his heirs. The proposition is well sustained by the authorities. (*Potter v. Washburn*, 13 Vt., 558; *Hill v. Draper*, 10 Barb. [N. Y.], 454; *Sharp v. Speir*, 4 Hill [N. Y.], 76; *Penrose v. Griffith*, 4 Binn. [Pa.], 231; *Hardenburgh v. Lakin*, 47 N. Y., 109; *Carver v. Jackson*, 4 Peters [U. S.], 1; *Murphy v. Loyd*, 3 Wharton [Pa.], 538; *Costello v. Burke*, 63 Ia., 361; *Miller v. Miller*, 63 Id., 387; *Kelley v. McBlain*, 42 Kan., 764; *Yahoola River Mining Co. v. Irby*, 40 Ga., 479; *Lamar v. Turner*, 48 Id., 329; *Devlin*, Deeds, sec. 996.)

The deed to McMurtry was executed less than three years before the trial in the district court, and, therefore,

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was of too recent date to be regarded as an ancient document, so as to entitle it to be introduced in testimony under the rules of evidence relating to ancient documents. It is elementary that the best evidence obtainable, or in existence, must be produced on the trial of a cause. The record shows that James F. Phinney was alive in 1884; and if he has since died there ought to be no difficulty in establishing that fact by competent evidence, and whether or not the persons who executed the deed were his heirs. The plaintiff must establish his title to the lands by a suit in ejectment before he can maintain a suit for a partition thereof. The judgment of the district court is

AFFIRMED.

THE other judges concur.

36	526
37	527
38	528
39	780
36	528
41	54
41	251
36	528
43	615
36	528
45	207
36	528
51	167
36	528
56	529
57	413
36	528
58	431
158	606

A. W. JONES v. A. S. HAYES.

FILED MARCH 29, 1893. No. 5084.

Error Proceedings: REVIEW: MOTION FOR NEW TRIAL. This court will not review alleged errors occurring during the trial of a cause in the district court by petition in error, unless a motion for a new trial was made in the trial court, and a ruling obtained thereon.

ERROR from the district court of Adams county. Tried below before GASLIN, J.

M. A. Hartigan, for plaintiff in error.

John M. Ragan and *J. B. Cessna*, contra.

NORVAL, J.

This was an action brought by A. S. Hayes upon a promissory note executed by A. W. Jones. Plaintiff re-

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covered a judgment in the court below for the sum of \$546.34, and the defendant prosecutes error to this court, alleging that the judgment is not sustained by the evidence and is contrary to law.

We cannot review the proceedings, for the reason the records fails to disclose that a motion for a new trial was presented to the trial court, and its ruling obtained thereon. While the transcript contains a copy of a motion for a new trial, it does not appear that the attention of the court below was ever called thereto. It has been frequently decided by this court that in order to review the proceedings of a district court by a petition in error, a motion for a new trial must be made in that court and a ruling obtained on the motion. (*Cropsey v. Wiggenghorn*, 3 Neb., 108; *Gibson v. Arnold*, 5 Id., 186; *Lichty v. Clark*, 10 Id., 472; *Smith v. Spaulding*, 34 Id., 128.) The petition in error is

DISMISSED.

THE other judges concur.

JENNIE BROWN ET AL., APPELLANTS, V. FRANK LUTZ,
APPELLEE.

FILED MARCH 29, 1893. No. 5573.

1. **Municipal Corporations: CITY COUNCIL: ORDINANCES.** In a city of the second class, containing a population of less than five thousand, an ordinance of a general character may be presented, read, and adopted by the city council thereof on the same day, provided the rule requiring such ordinances to be fully read on three different days is dispensed with by a vote of three-fourths of the members of the council.
2. ———: **LIQUOR LICENSES: ORDINANCES.** Certain provisions contained in the ordinance of the city of G., regulating the license and sale of liquors, held valid.

36	587
42	756

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3. ———: ———. No license for the sale of intoxicating liquors, issued by a city of the above class, can extend beyond the municipal year in which it shall be granted.
4. ———: ———: NOTICE OF APPLICATION. Action cannot be taken by a city council on an application for a liquor license until at least two weeks' notice of the filing thereof has been given in the mode provided by law.
5. ———: ———: PETITION FOR LICENSE: REMONSTRANCE: BURDEN OF PROOF. Where a remonstrance in opposition to an application for such a license denies that the petition is signed by the requisite number of resident freeholders, the burden is upon the applicant to prove by competent evidence that the same is signed by the required number of qualified petitioners, and if he fails so to do, a license should be refused.
6. ———: ———: ———. It is not necessary to state in such a petition whether the applicant desires to sell at wholesale or retail.

APPEAL from the district court of Fillmore county.
Heard below before HASTINGS, J.

F. B. Donisthorpe, for appellants.

Charles H. Sloan and John D. Carson, contra.

NORVAL, J.

This is an appeal from the decision of the district court of Fillmore county sustaining the action of the city council of the city of Geneva in overruling the remonstrance of appellants to the petition of Frank Lutz for a license to sell intoxicating liquors in the first ward of the said city.

It is argued that the city council had no jurisdiction to issue the license for the reason that the ordinance under which license was sought was void. This objection is predicated upon the fact that the ordinance in question was presented, read, and passed by the city council on the same day.

Section 79 of article 1, chapter 14, Compiled Statutes, declares that "All ordinances and resolutions, or orders, for the appropriation or payment of money, shall require,

for their passage or adoption the concurrence of a majority of all members elected to the council or board of trustees; ordinances of a general or permanent nature shall be fully and distinctly read on three different days, unless three-fourths of the council or trustees shall dispense with the rule," etc.

The foregoing section is found in the act governing cities of the second class, containing less than 5,000 inhabitants, and is a limitation upon the powers of city councils of such cities as are embraced within the act in the passage or adoption of ordinances. It requires no argument to show that an ordinance of a general character cannot legally be read and put upon its final passage by a city council of the class to which the city of Geneva belongs on the same day it is presented or introduced, unless at least three-fourths of the council shall vote to dispense with the rule which requires the reading of ordinances on three different days before their adoption. But if the rule be thus suspended, the conclusion is irresistible that an ordinance can be placed upon its first, second, and third readings, and be passed on the same day it was first presented. To support the position that the ordinance in question could not be passed at the same meeting at which it was introduced, counsel for appellants cites section 123 of chapter 12a of the Compiled Statutes, which reads as follows:

"Sec. 123. All ordinances of the city shall be passed pursuant to such rules and regulations as the council may prescribe; *Provided*, That upon the passage of all ordinances the yeas and nays shall be entered upon the record of the city council, and a majority of the votes of all the members of said council shall be necessary to their passage; *Provided further*, That, no ordinance shall be passed the same day or at the same meeting it is introduced, except the general appropriation ordinance at the first meeting of each month."

It is plain that the foregoing provisions have no bearing

upon the question now under consideration, inasmuch as the section last above quoted is contained in the act defining, regulating, and prescribing the duties, powers, and government of metropolitan cities. While there is no proof in the record before us as to the population of Geneva, we will take judicial notice of the fact that it is a city of the second class, containing a population of less than five thousand, and, therefore, is governed by the act of the legislature incorporating cities of the second class and villages.

The transcript of the record of the proceedings of the city council of the city of Geneva, which is before us, shows that the ordinance in dispute was passed in strict conformity with the provisions of section 79, copied above. At the meeting at which the ordinance was adopted the mayor and every member of the city council were present, and after the first reading of the ordinance the rule requiring the same to be distinctly read on three different days was dispensed with by the unanimous vote of the council. The ordinance was then read a second time, and on motion the said rule was again suspended by a like vote of the council, and the ordinance was put upon its third reading and was passed and adopted by the vote of each member of the city council voting in favor thereof upon the call of the yeas and nays, and the same was declared adopted. Every requirement of the statute has been observed in the passage of the ordinance, and the objection to the granting of the license on that ground must be overruled.

It is urged that section 15 of the ordinance is unreasonable and unjust, because it provides that no chairs or seats of any kind shall be placed in any saloon, and fixes a penalty for any violation thereof. The objection is without merit. The provision referred to is a reasonable one, and if it were not the remonstrators would have no just cause to complain, since it is not shown that their rights are in any manner affected thereby.

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It is claimed that section 7 of the ordinance leaves it optional with the council as to the length of time a license shall be issued. The language of the provision is: "The license shall state the time for which it is granted, which shall not exceed one year or extend beyond the end of the municipal year for which it is granted." The objection is too technical. The word "or" as used in the quotation should be construed to mean "nor." It was evidently the intention of the city council to conform the ordinance to the provision of the statute, which expressly declares that the license shall not extend beyond the municipal year in which it shall be granted, and a fair interpretation of the ordinance is that it does not authorize the issuing of a license to run beyond the close of the municipal year.

Another objection urged against the ordinance is that it does not specify the officer who shall sign or issue the license. While there is no provision in the ordinance which in express words declares who shall sign the license, the seventh section prescribes the form of the license, which shows that it is to be signed by the city clerk and attested with the city seal. This is a sufficient designation of the person who shall sign or issue a license which has been granted by the city council.

One of the grounds of the remonstrance is that the petition for the license is not signed by the requisite number of resident freeholders. It contains the signatures of only thirty persons, which would be sufficient if all the persons signing it were qualified petitioners. There is no competent proof in the record before us that any of the persons who signed the application were resident freeholders of the ward in which the business was to be carried on. The only evidence upon the subject is the certificate of the county clerk to the effect that the petitioners are resident freeholders of the ward, which testimony at the time of its introduction was objected to by the remonstrators. The

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certificate of the county clerk, under the provisions of section 5 of the ordinance, would perhaps be sufficient to authorize the granting of a license where no remonstrance is filed; but where one of the grounds of a remonstrance is that the signers of a petition for a liquor license are not resident freeholders, the burden is upon the applicant to establish by competent evidence that the same is signed by the requisite number of qualified petitioners. (*Lambert v. Stevens*, 29 Neb., 283.)

Objection is made that sufficient notice of the application for a license was not given. It appears from the affidavit or proof of publication attached to the notice, made by the publisher of the *Geneva Democrat*, a weekly newspaper of general circulation in Fillmore county, that a notice of the filing of Frank Lutz's application for a license, in due form, signed by the city clerk, was published for two consecutive weeks in said newspaper, commencing on the 2d day of June, 1892. The remonstrance was filed on June 16, but by stipulation of counsel for the respective parties no action was taken thereon until June 21, when a hearing was had on the remonstrance before the city council. We think sufficient notice was given in this case, even though the paper in which it was published was not actually deposited in the post-office until June 3, as testified to by some of the witnesses, since more than two weeks elapsed after that date before the city council took any action upon the application for a license. Two weeks' notice is all the statute requires.

It is further claimed that the petition is defective because it does not state whether the applicant desires a license to sell at wholesale or retail. It was not necessary that it should so state. The statute does not require it. The law relating to the sale of intoxicating liquors applies to all persons engaged in the traffic, wholesalers and retailers alike. It makes no distinction between them, and a petition for a license need not state how the liquors are to be sold.

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For the reason that it does not appear that the petition was signed by a sufficient number of resident freeholders, the judgment of the district court affirming the decision of the city council is reversed and the application for a license dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

JOHN S. GREGORY, EXECUTOR, v. THEODORE KAAR
ET AL.

FILED MARCH 29, 1893. No. 5248.

1. **Assignments of Error: REVIEW: PRACTICE.** Assignments of error which are so vague and indefinite as not to indicate the rulings complained of will be disregarded in this court.
2. **Pleading: NEW CAUSE OF ACTION IN REPLY: WAIVER OF OBJECTION.** A new cause of action should not be presented in the reply, but when no objection is made on that ground in the district court and the issues presented are submitted on their merits, the objection that the cause of action was first stated in the reply will be held to have been waived.
3. **Bill of Exceptions: COLLATERAL ATTACK.** A bill of exceptions duly allowed and certified by the trial judge imports absolute verity and its truthfulness cannot be assailed collaterally.
4. **Mechanics' Liens: EVIDENCE** held to sustain the finding and judgment of the district court.

ERROR from the district court of Lancaster county.
Tried below before HALL, J.

John S. Gregory, for plaintiff in error.

T. C. Munger, contra.

36	533
40	63
40	189
40	515
36	533
43	734
36	533
461	67
36	533
62	218

Post, J.

The National Lumber Company commenced an action in the district court of Lancaster county to foreclose a mechanic's lien against a certain lot in the city of Lincoln owned by John McAllister, who was made a defendant therein. The defendant in error, Theodore Kaar, who had filed a statement under oath claiming a lien against the same property, was also made a party defendant. The latter filed a cross-petition alleging that he had furnished stone for use in the construction of the building on said lot, under a contract with McAllister, the owner, and that there was due him a balance of \$19.41, and praying for a foreclosure of his lien.

To this cross-petition McAllister filed an answer in which he alleged payment in full, also a cross-bill against Kaar for \$327.34 on account of money advanced for stone by the terms of another and different contract, alleging as a breach thereof a failure to deliver said stone. To the cross-bill of McAllister, Kaar filed a pleading entitled an answer, in which he denies that he was in default of any of the provisions of the contract and alleging that all money paid him by McAllister was for stone before that time actually delivered.

During the trial Kaar, by leave of court, over the objection of McAllister, filed an additional pleading entitled "An amended reply and answer to cross-petition," which after a denial of payment of the bill set out in the original cross-petition is as follows: "By way of counter-claim and set-off, and in answer to the cross-petition of McAllister, defendant, the said Kaar denies that he agreed to furnish to said McAllister 700 perch of common rubble stone at an agreed price of \$1.00 per perch; that this defendant did deliver to defendant McAllister a large amount of rubble stone under an oral agreement with the said McAllister, but at the agreed price of \$1.20 per perch of 1,650 lbs., and

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not as alleged in said McAllister's cross-bill, and that the payments made by defendant McAllister on said rubble stone were made at that price; that the defendant delivered to said McAllister under such agreement on or before April 20, 1887, 492 $\frac{2}{3}$ perch, amounting to \$591.45 for rubble stone; that said defendant McAllister has paid in all for said rubble stone the sum of \$570, and there is now due this defendant from said McAllister the sum of \$21.45, with interest from April 20, 1887. This defendant further says that on or before July 23, 1887, he delivered to said McAllister under an oral agreement to pay therefor the sum of 25 cents per superficial foot, 12 pieces of stone 19 in. by 15 in. by 6 in., 8 pieces 20 in. by 20 in. by 8 in., 4 pieces of stone, dimensions 5 ft. 6 in. by 1 ft. 10 in., and 4 pieces of stone 4 ft. by 1 ft. 10 in., and 20 pieces of stone 5 ft. by 8 in., and 5 pieces 23 in. by 8 in. by 5 feet, of the total value of \$81.47, and there is now due this defendant from said McAllister the sum of \$81.47 and interest from July 23, 1887, therefor; in all the sum of \$102.92, for which amount, with interest on \$21.45 from April 20, 1887, and on \$34 from July 23, 1887, and costs of suit, this defendant prays judgment."

A decree of foreclosure was entered in favor of Kaar for \$25, evidently on the cause of action stated in his original cross-petition, and personal judgment against McAllister for \$71 on the cause of action stated in his last pleading. McAllister having died in the meantime the action was revived in the name of Gregory, his executor, who filed a motion for a new trial on the following grounds:

1. The court erred in giving judgment in favor of the defendant Theodore Kaar, whereas under the pleadings and evidence said defendant's cross-petition should have been dismissed.
2. The judgment is contrary to the evidence.
3. The judgment is in excess of the amount claimed in defendant Kaar's cross-petition.

4. The judgment is not sustained by the law and evidence.

The motion for a new trial having been overruled, Gregory filed a petition in error in this court by which he seeks to have the judgment of the district court reversed for errors alleged therein, the first of which is that the court "erred in permitting plaintiff below to introduce evidence contradictory of the account rendered to the defendant on his demand before the trial." Such an assignment is too vague and indefinite to be considered upon petition in error and will be disregarded by the appellate court. (*Burlington & M. R. R. Co. v. Harris*, 8 Neb., 140; *Kroll v. Ernst*, 34 Id., 482.)

2. The second assignment is the order allowing the filing of the amended pleading above mentioned. The objection in the district court and also in this court goes only to the cause of action, and not the discretion of the court in allowing defendant in error Kaar to amend. Should the pleading in which the second cause of action is alleged be construed as entitled, viz., a reply, it is subject to the objection that a new and different cause of action cannot be presented by way of reply. (Maxwell, Code Plead., 558.) But it is evident, notwithstanding the title of the pleading, that it was treated by both parties and the court as an amended petition, and in the reply of McAllister thereto it is called an amended cross-petition. No objection having been made on the ground above named, it is plain that there is no prejudicial error in the order complained of. The court in its discretion may allow amendments and the exercise of that discretion is not ordinarily subject to review in this court. (Civil Code, 144.) The only other assignment of error which calls for notice is that the judgment is not sustained by the proofs. In his discussion of that question counsel for plaintiff in error assails the bill of exceptions, which he asserts is incomplete and untrue. It is needless to discuss the question further than to re-

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mark that a bill of exceptions, when allowed and signed as provided by statute, is presumptively correct, and its veracity cannot be called in question in the manner attempted in this case. (Elliott, App. Proced., 811.) The evidence, as certified by the trial judge, is of such character as to render a summary thereof difficult, and, to state it intelligently, would practically require it to be copied at length. It is enough to say that the evidence is quite sufficient to sustain the findings of the district court. In fact we do not see how any other conclusion could have been drawn from the proofs. The judgment of the district court is

AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. ALFRED L. SNOW, V.
PETER FARNEY, TREASURER.

FILED MARCH 29, 1893. No. 5814.

1. **Tax Sales: COMPETITION.** It is the policy of the law to encourage competition at the sale of property for delinquent taxes.
2. ———: **DUTY OF OFFICER.** The provision of the revenue law for the keeping open of the public sale of lands for delinquent taxes is mandatory, and a substantial compliance therewith is demanded of the officer conducting such sale.
3. ———: ———: **UNLAWFUL ADJOURNMENT.** Where the public sale for delinquent taxes was opened at 9 o'clock A. M., and adjourned *sine die* at the expiration of an hour and a half thereafter, the property all remaining unsold for want of bidders, and the treasurer in charge thereof refused to entertain bids for the property advertised which were tendered at 3 o'clock P. M. of the same day, *held*, not a compliance with the statute which requires the sale to be kept open from 9 o'clock A. M. until 4 o'clock P. M.

36	537
43	859
36	537
46	623
36	537
52	37
58	770

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4. ———: RIGHT OF PERSON DESIRING TO BID TO DEMAND OFFER TO SELL: MANDAMUS TO TREASURER. One who in good faith attends upon a public sale of property for delinquent taxes at the time named in the advertisement and requests the treasurer to offer the delinquent property for sale, and demands the right to bid therefor, has such an interest therein as will entitle him to prosecute proceedings by *mandamus* to compel the treasurer to discharge his duty by offering said property for sale.

ORIGINAL application for *mandamus* to compel the respondent, as treasurer of Hamilton county, to offer at public sale all lands and lots upon which the taxes assessed for the year 1891 remain delinquent. *Writ allowed.*

Harlan & Harlan and *A. W. Agee*, for relator.

J. H. Broady, *contra*.

Post, J.

This is an original application for a writ of *mandamus*, and is submitted upon exceptions by both the relator and the respondent to the findings of the referee to whom the issues were submitted for trial, also upon the motion of the relator for judgment upon the findings. The pleadings are too voluminous to be set out at length in this opinion, but the issues are apparent from the findings of the referee, which are as follows:

"1. That the defendant Peter Farney is now, and has been during all the times mentioned in the pleadings and testimony in this cause, the treasurer of Hamilton county, Nebraska.

"2. That taxes were duly levied for the year 1891 upon the several descriptions of lands and lots in said county after the same had been duly assessed, and that there were due and delinquent a large amount of taxes on said lands and lots as stated in the plaintiff's petition; that due and legal notice was published by the defendant that he would on the first Monday in November, to-wit, November 7,

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1892, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon, at the court house in said county, offer at public tax sale all lands upon which the taxes levied for city, county, and other purposes for the previous year remained due and unpaid; that said notice was in all respects as required by law.

"3. That at 9 o'clock, standard time, on November 7, 1892, in his office at the place mentioned in said notice, the defendant read in the ordinary tone of voice the formal part of said notice of tax sale, and also read the first description of lands mentioned in said notice and inquired if there were any bidders therefor. Receiving no bids for that tract, he enquired if there were any bidders for any other tracts mentioned in said notice. No bids were made. After waiting about one and one-half hours the defendant declared the sale closed, and made his return to the county clerk. A copy of said return is marked Exhibit A and attached to the defendant's answer. There were present during said one and one-half hours the defendant and his son Charles J. Farney. The testimony does not show that any other person was present. No public outcry of the sale was made other than as hereinbefore stated.

"4. That said Charles J. Farney represented at said time the following named loan companies having mortgages on real estate in Hamilton county, Nebraska, to-wit: Iowa Loan & Trust Company; De Witt Bank; Fidelity Loan & Trust Company; New England Loan & Trust Company; Nebraska Mortgage Company; Security & Investment Company; Equitable Loan & Trust Company; Grand Island Banking Company; L. W. Tulleys, Trustee Globe Investment Company; Eastern Banking Company; Omaha Loan & Trust Company; Nebraska Loan & Trust Company; Concordia Loan & Trust Company. That said Charles J. Farney was present to bid on said lands in case other bidders were present, his purpose and intention being to protect the interest of the loan com-

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panies he was representing. Immediately after making his return to the county treasurer the defendant agreed with Charles J. Farney to make out, as soon as convenient, to the several loan companies represented, certificates of tax sale at private sale for lands in which they were so interested, and it was also agreed that in the meantime if any land-owner so desired, they might pay the taxes on the lands so owned by them and no certificates should be issued for lands on which the taxes had been so paid. No money was deposited or produced by the loan companies or either of them or by their representative. No certificates of tax sale have been made by the defendant to any one, the issuance of certificates having been prevented by the institution of these proceedings. Between the dates November 19, 1892, and December 27, 1892, both dates inclusive, the owners thereof have paid the taxes on the several descriptions of land set out in the certificate of the defendant Peter Farney shown in the transcript of this case marked Exhibit L.

"5. That on or about November 1, 1892, one Phillip Burt left with the defendant \$500 under an agreement that he should bid on lands offered at public sale, and if not present and the lands were not sold at public sale the defendant would consider him as a bidder after the several loan companies had taken the lands upon which they had mortgages.

"6. On November 5, 1892, and being the Saturday before the time fixed for the sale, A. S. Harlan, representing the plaintiff, met the defendant in front of the court house and inquired as to the time of sale and practice of the defendant in making sale. He was then informed by the defendant that the sale would begin at 9 o'clock on the Monday morning following and would be kept open for an hour or two, when return would be made to the clerk, and sales made thereafter at private sale. Harlan replied, stating that he wanted to buy and would try and be there

by the time the sale opened. At the same time the defendant told Mr. Harlan that other parties had already filed lists for lands they desired. On Monday, November 7, 1892, Mr. Harlan arrived at Aurora about 11 o'clock in the forenoon, having been delayed by the lateness of arrival of train; he went directly to the treasurer's office and inquired of the person in charge if the sale was closed, and was answered that it was. He returned again to the treasurer's office at about 3 o'clock in the afternoon of the same day in company with Mr. Agee, attorney for relator. Both Mr. Harlan and Mr. Agee requested the defendant to open up the sale and give them a chance to bid for the relator. The defendant refused, saying that the sale had been closed and he had made his return to the county clerk. At this time both Mr. Harlan and Mr. Agee insisted that they had the right to bid and that the action of the defendant in the matter was illegal. The defendant insisted that his action was in accordance with custom and refused to open the sale or receive bids.

"7. On the following day, November 8, 1892, and being general election day, about 3 o'clock in the afternoon, Mr. Agee, representing the relator, accompanied by Messrs. Musser and Peterson, went to the office of the defendant in Aurora, which was then open with the defendant in charge. Mr. Agee produced a list of the lands upon which the taxes, as shown by the treasurer's book, were delinquent and unpaid, which list had been previously made from the treasurer's books by himself and Mr. Harlan, assisted by others, including the clerks in the office of defendant, and Mr. Agee also at the same time produced a large roll of money and asked that the sale be opened and that he be allowed to bid thereat, and offered to pay all taxes, interest, penalties, costs, and charges against each of the tracts of land mentioned in the list for the one-half portion of each of said tracts respectively, and asked that certificates be issued to the relator for the same. The defendant refused

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to open the sale or to receive the bids, insisting that the sale was closed, and that the return had been made to the county clerk.

"8. On the day following, to-wit: November 9, 1892, Mr. Agee, attorney for relator, met the defendant in the hall of the court house and near the office of the treasurer and delivered to him the paper, a copy of which is attached to defendant's answer and marked Exhibit E, which exhibit is made a part of this report. The defendant at once read the paper, and in response to an oral question propounded to him by Mr. Agee, stated that he adhered to his former decision and that the public sale had been closed and that he would not reopen it.

"9. That the defendant had no pecuniary interest in refusing to open the sale as requested by relator nor in denying to him the privilege of bidding, and that the defendant acted throughout the entire transaction in good faith, in accordance with the custom of previous years, and as he honestly believed his duty required him to act, and so believing treated said loan companies and Phil. Burt as preferred and prior bidders.

"10. That Carl Farney, Charles Farney, and Charles J. Farney, mentioned in the pleadings and testimony, is one and the same person, and the son of the defendant herein.

"11. That Peter Farney, Jr., and P. A. Farney, mentioned in the testimony as deputy treasurer, is one and the same person, and son of the defendant herein.

"12. That during the times mentioned in the pleadings and testimony said P. A. Farney was the duly acting deputy treasurer of Hamilton county, acting under a written appointment bearing date January 4th, 1891, but which appointment was not filed in the office of the county clerk until the 30th day of December, 1892, and after the taking of the oral testimony in this cause. That said Charles J. Farney had also acted as deputy county treasurer prior

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to the transaction which is the basis of this action. No revocation of the appointment of said Charles J. Farney as deputy treasurer of said county, nor any bonds for either of said deputies, are on file in the office of the county clerk of said county.

"13. At the hearing in this cause the relator, by his attorney, A. W. Agee, relinquished all claim to bid on any lands on which the owners thereof had paid the taxes thereon to the treasurer and for which receipts have been issued.

"14. By oral agreement of the parties the certificate attached to the oral testimony, marked Exhibit I, made by the county clerk of Hamilton county, Nebraska, under date January 6, 1893, was admitted in evidence and treated the same in all respects as if the facts therein stated had been orally testified to by said county clerk."

The exhibit to which reference is made in the 8th finding is the following:

"AURORA, Nov. 9, 1892.

"*Peter Farney, Treasurer Hamilton County, Neb.*: The undersigned, Alfred L. Snow, hereby requests that you offer for sale at public auction, as provided by law, each and every tract and parcel of land in said county upon which taxes remain delinquent for the year 1891, and which has been advertised for sale by you, and to give to the undersigned a reasonable opportunity to bid thereon by keeping said sale open by adjournment from day to day if need be, until each and every one of said tracts shall be offered for sale for all taxes, interest, penalties, and costs thereon, and the undersigned hereby now offers and agrees to pay all taxes, interest, penalties, and costs and charges chargeable against each of said tracts or parcels of land respectively, for the one-fourth portion of each of such tracts respectively, and he hereby requests that you issue to him certificates of purchase as required by law, unless a better bid is made, in

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which event the undersigned desires an opportunity to and will make further or better bid.

"ALFRED L. SNOW,

"By A. W. AGEE,

"*His Attorney and Agent.*"

The exhibit mentioned in the 14th finding is a certificate from the county clerk of Hamilton county, under date of January 6, 1893, to the effect that the only appointment of P. A. Farney or Peter A. Farney, on file in his office as deputy county treasurer for said county, bears date of January 4, 1891, and filed December 30, 1892, and that there is on file in said office no evidence that the appointment of Chas. J. Farney, as deputy treasurer, has ever been revoked. It is not contended that the transaction on November 7 was a substantial compliance with the requirements of the law, and it is plain that it was not.

By section 109 of the revenue law it is provided: "On the first Monday of November in each year, between the hours of 9 o'clock A. M. and 4 P. M., the treasurer is directed to offer at public sale, at the court house, or place of holding court in his county, or at the treasurer's office, all lands on which the taxes levied for state, county, township, village, city, school district, or any other purpose for the previous year still remain unpaid, and he may adjourn the sale from day to day, until all the lands, and lots, or blocks have been offered."

That the foregoing provisions are mandatory does not admit of a doubt. Similar language will not be held to be permissive merely where it is plain that the legislature intended to impose a duty rather than confer a privilege. (*Kelly v. Morse*, 3 Neb., 224; *People v. Buffalo County*, 4 Id., 150; *Follmer v. Nuckolls County*, 6 Id., 204; *Cooley, Taxation*, 214.)

It is the policy of the law to encourage publicity and competition at the sale of property for delinquent taxes, for two sufficient reasons: first, to secure payment of the

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taxes levied to carry on the state and municipal governments, and second, to prevent the needless sacrifice of the property of taxpayers. The sale is conducted by public officers sworn to faithfully discharge their duties, and generally in the absence of the owners of the property offered; hence the law exacts of such officers the utmost good faith. It has been frequently held that where a treasurer fails to publicly offer property but allows proposed purchasers to furnish lists in writing of the lands for which they wish to bid, with the price offered therefor, to be subsequently entered by him on his books, the transaction does not amount to a sale and is at least voidable at the election of the property owner, if not absolutely void. (Cooley, Taxation, 339; *Young v. Rheinecker*, 25 Kan., 366; *Butler v. Delano*, 42 Ia., 350; *Miller v. Corbin*, 46 Id., 150.) The treasurer in this case, while proceeding in good faith, seems to have acted upon an entire misconception of his responsibility to the public as well as his duty to taxpayers and bidders. The fact that his course was in accordance with the custom of the office is, upon legal grounds, no more defensible than such custom is creditable to the sagacity and business methods of his predecessors.

2. Assuming, as we must, that the failure to offer at public sale was a radical one, and the return made within two hours of the time for the opening thereof was without authority of law, what are the rights of the relator? It is argued by the respondent that a writ of *mandamus* will not be allowed on the application of a mere proposed bidder. It is said that since neither the taxpayers nor the public are complaining the loss of anticipated profits by one wishing to bid is at most *damnum absque injuria*. It was held by this court in *Richardson County v. Miles*, 7 Neb., 123, that *mandamus* will lie to compel a county treasurer to issue certificates of purchase to the best bidder at tax sale. See also to the same effect, Cooley, Taxation, 742, and authorities cited. It has also been frequently held that

mandamus is the proper remedy to compel public officers to let contracts to the lowest bidders. (See *People v. Buffalo County*, 4 Neb., 150; *Follmer v. Nuckolls County*, 6 Id., 204; *State v. Saline County*, 19 Id., 253; *Boren v. Commissioners of Darke County*, 21 O. St., 311.)

It does not appear, either from the pleadings or the findings of the referee, that the relator is a resident or taxpayer of Hamilton county. There is, in fact, no pretense by him of an intention to promote any interest of the general public or the taxpayers of the county. The right sought to be enforced is therefore essentially a private one, although the duty sought to be enforced is one imposed in the interest of the public at large. The rule is apparently well settled that a private individual will be entitled to the writ of *mandamus* only in case he has some private right or particular interest to be subserved, or some particular right to be preserved or protected, independent of that which he holds in common with the public at large. (*Wellington, Petitioner*, 16 Pick. [Mass.], 85; Maxwell, Code Pleading, 233; Merrill, *Mandamus*, 238.)

The application of the above rule to the case at bar is, however, attended with more difficulty. When the case was under consideration, the writer seriously doubted whether the relator had such an interest as would entitle him to maintain the action. But upon reflection we all agree that this case is within the reasoning of the cases cited from this court. We are not to be understood as intimating that every person proposing to purchase at treasurer's sale for delinquent taxes would be entitled to the writ. But one who in good faith, in person or by agent, attends on the day designated by statute for the public sale, with the intention of purchasing, is within the rule, and may by *mandamus* compel the treasurer to discharge his duty by opening the sale and affording bidders an opportunity to compete for the property advertised as delinquent. The reasoning of the present chief justice in *People v. Buffalo*

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County, *supra*, is quite applicable to the controversy. For instance, he says: "To permit commissioners to accept plans and bids thereon at the same time, they accepting such as they approve, prevents all competition, and opens the door to corruption, favoritism, and fraud, and is against the policy of the law." A wanton refusal to expose property for sale after it has been advertised at the expense of the county would be a malfeasance in office, and a fraud alike upon the taxpaying public and parties who had attended with the intention of bidding therefor. The remaining question is how the respondent shall be required to proceed. It is plain that he was not a purchaser at the public sale, since it had been adjourned *sine die* before his arrival, and the treasurer refused to even consider his bids. He is not therefore entitled to certificates of purchase. The right of the treasurer to sell property at private sale for delinquent taxes depends upon a previous offer at public sale and a return by him to the county clerk as provided by sections 112 and 113, revenue law. Since there was a failure to offer at public sale, it follows that the treasurer is now without authority to sell at private sale. (*State v. Helmer*, 10 Neb., 25.) His fault was in the inception of the controversy when he summarily adjourned the public sale and refused to the relator an opportunity to bid for the property advertised. The argument that the power to offer at public sale has been exhausted, and that another sale at this late date would necessitate a needless expense to the respondent, is without force. Whatever costs or expenses may attend a second notice and sale are but the legitimate fruits of the disregard of a duty plainly enjoined by law, and of which the respondent cannot now complain. The character of the title which a purchaser would acquire through a sale in obedience to a judgment of the court is not necessarily involved in this controversy. It is sufficient that lapse of time is no obstacle to relief by *mandamus* when sought on the ground of

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the refusal of a public officer to discharge so plain a duty. (Merrill, Mandamus, 79, 192.)

It follows that a peremptory writ of *mandamus* should issue requiring the respondent to offer at public sale, to the best bidders therefor, all lands and lots upon which the taxes assessed for the year 1891 remain delinquent, after giving notice for the time and in the manner provided by law.

WRIT ALLOWED.

THE other judges concur.

FRED H. GORDER, EXECUTOR, ET AL., APPELLEES, V.
PLATTSMOUTH CANNING COMPANY, APPELLEE,
AND WILLIAM WEBER ET AL., APPELLANTS.

FILED MARCH 29, 1893. No. 4709.

1. **CORPORATIONS: EXECUTION OF DEED OR MORTGAGE: PRESUMPTION OF AUTHORITY.** Where a deed or mortgage purporting to have been executed by a corporation is signed and acknowledged in its behalf by the president and secretary thereof, with the corporate seal attached, the presumption is that it was executed by authority of such corporation and the burden of proof is upon one who denies such authority.
2. ———: **CONTRACTS ULTRA VIRES: BURDEN OF PROOF.** Contracts of a corporation which are not contrary to the express provisions of its charter are presumed to be within its powers, and the burden is upon one denying their validity to prove the facts which render them *ultra vires*.
3. ———: ———: **EVIDENCE** held to sustain the findings of the district court that the indebtedness secured by the mortgage of the defendant corporation was not in excess of the limitation named in its charter.
4. ———: ———: **DIRECTORS AND STOCKHOLDERS: FIDUCIARY RELATIONSHIP.** The relation of the directors to stockholders of

86	546
87	51
86	548
41	445
36	548
43	544
36	548
44	491
36	548
45	552
45	759
36	548
50	417
51	540
52	840
53	672
36	548
56	732
57	239
36	548
158	187

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a corporation is of a fiduciary character and their contracts and dealings with respect to the corporate property will be carefully scrutinized by the courts. Such contracts are not, however, necessarily void. Where it is clear that the transaction is in good faith on the part of the director and beneficial to the corporation which has with the sanction of the stockholders received and appropriated the consideration without offering to make restitution, it may be upheld when assailed even in a court of equity.

5. ———: ———: ———. EVIDENCE examined and *held* to sustain the finding that the indebtedness of the defendant company to the plaintiffs, directors thereof, was contracted with the knowledge and approval of the intervenors, who were stockholders, and that the execution of certain mortgages to secure such indebtedness was sanctioned by such stockholders.
6. ———: NOTICE OF INDEBTEDNESS: LIABILITY OF STOCKHOLDERS. In order to recover from stockholders of a corporation on account of a failure to give the statutory notice of its indebtedness, it must affirmatively appear that the credit was given to such corporation while it was in default of the required notice.

APPEAL from the district court of Cass county. Heard below before FIELD, J.

G. W. Covell and Beeson & Root, for appellants.

A. N. Sullivan, contra.

Post, J.

This is an appeal from a decree of the district court of Cass county. In the petition it is alleged that on the 25th day of November, 1887, the plaintiffs executed their joint note for \$5,000 to the First National Bank of Plattsmouth, due in six months from date, and that on the 30th day of December, 1887, they executed a second note to said bank, due six months after date, for \$4,500; that said notes were both executed for the accommodation of the defendant, the Plattsmouth Canning Company; that to secure the payment of said notes, and to indemnify plaintiffs as sureties thereon, the defendant company on the day last named executed and delivered to them a mortgage upon certain

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real estate in the city of Plattsmouth; also a chattel mortgage upon all of the machinery, fixtures, and other personal property of said company. The petition, after an allegation of a breach of the conditions of the mortgage, contains a prayer for an accounting and foreclosure and for general equitable relief.

The canning company filed an answer, admitting all the allegations of the petition contained except as to the amount of indebtedness claimed therein. Shortly thereafter, and before trial, the court permitted the appellants to intervene and file answer, in which they allege, in substance, that they are stockholders in said company, and that it commenced business in 1885 with a capital stock of \$18,000; that by the articles of incorporation it is provided that at no time shall the indebtedness of said company exceed one-half of the capital stock thereof; that the plaintiffs were elected directors of said company at its organization, and, with the exception of the plaintiff Lewis, have continued to act in such capacity; that the plaintiff Guthman has been the president of said company ever since its organization, and the plaintiffs Lewis and Gorder have been the only secretaries thereof; that at all times since the first year of the existence of said corporation its indebtedness has been largely in excess of the limit fixed by its articles of incorporation, and that said excess of indebtedness was incurred by the plaintiffs as directors of said company without any authority from its stockholders; that the notes and mortgages described in the petition were executed without any authority whatever, and that F. R. Guthman as president and E. B. Lewis as secretary, who pretended to execute said mortgages, are plaintiffs in this action; that the property described in said mortgages comprises the entire assets of said company, and that there are in addition to the amounts claimed on said notes and mortgages at least \$4,000 of debts owing by said company, for which the stockholders are individually liable because

of the neglect of plaintiffs to comply with the laws in regard to corporations; that the debts owing by said corporation were all contracted while the officers thereof were in default in complying with the statutory provisions governing corporations, requiring them to publish annually a statement of all the existing debts of said corporation. The intervenors pray that plaintiffs' petition be dismissed with costs, that said mortgages and the record thereof be canceled, and for equitable relief.

During the progress of the trial, by permission of court, intervenors filed an amendment to their answer, setting up that they and each one of them are creditors of the defendant canning company, having advanced various sums from \$25 to \$300 each by way of loans to said defendant at its request, which sums are still due and unpaid. In addition to the relief asked in their answer they pray for a receiver of said company to take charge of its property and convert the same into cash, to be applied first in payment of the general indebtedness thereof exclusive of the amounts owing to its stockholders, and that the funds remaining be applied *pro rata* between the different stockholders.

On the hearing before the district court there was a general finding for the plaintiffs and a decree of foreclosure in accordance with the prayer of the petition, from which the intervenors have appealed to this court. The first proposition argued is that the evidence fails to show authority from the board of directors for the execution of the mortgages or either of them. Both mortgages purport to have been executed by the Plattsmouth Canning Company and acknowledged in behalf of said company by F. R. Guthman, president, and E. B. Lewis, secretary, and attested by the seal thereof. The genuineness of the signatures to the mortgage, as well as the official character of the signers, is specifically admitted, but we understand counsel for intervenors to contend that authority for the execution of the mortgages must affirmatively appear from the record of the board of directors.

To that proposition we cannot give our assent. The signatures of the officers with the corporate seal attached is *prima facie* evidence that the mortgages were executed by authority of the company, and the burden of proving want of authority is upon the intervenors. (Ang. & Ames, Corp., sec. 217; Boone, Corp., sec. 50; *Blackshire v. Iowa Homestead Co.*, 39 Ia., 624; *Whitney v. Union Trust Co.*, 65 N. Y., 577; *Davis v. Jenney*, 1 Met. [Mass.], 221; *Williamsburg City Fire Ins. Co. v. Frothingham*, 122 Mass., 391; *Murphy v. Welch*, 128 Id., 489; *Hamilton v. McLaughlin*, 12 N. E. Rep. [Mass.], 424; *Morris v. Keil*, 20 Minn., 531; *Musser v. Johnson*, 42 Mo., 74.)

2. It is claimed that the mortgages are void for the reason that they are in excess of the amount of indebtedness authorized by the articles of incorporation of the company. It is provided by article 4 that "the highest amount of indebtedness to which the corporation shall at any time subject itself shall not exceed one-half of the amount of its capital stock issued." It appears from the bill of exceptions that \$5,000 of the indebtedness represented by the mortgages was incurred on the 18th day of August, 1885, on which day the plaintiffs executed their joint note to the First National Bank of Plattsmouth for the accommodation of the company, the note of like amount, described in the mortgages, being a renewal thereof. At that time the amount of stock issued does not appear, although it is alleged in the answer that the capital stock in February, 1885, was \$18,000, nor is the amount of the company's indebtedness apparent from the record. It appears also, from the minutes of a meeting of stockholders held January 4, 1886, that 148½ shares of stock were represented thereat, from which it is evident that the stock at that date amounted to at least \$14,850. The date when the additional indebtedness of \$4,500 was incurred does not appear, but the note for said amount is in renewal of an accommodation note executed by plaintiffs for the benefit of the company long

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prior to the execution of the mortgages. The presumption is in favor of the validity of the contract in question. It is not upon its face necessarily outside the scope of the corporate power of the defendant company. The recognized rule is that the contracts of a corporation not contrary to the express provisions of its charter are presumed to be within its powers, and the burden is upon one seeking to invalidate them to prove the facts which render them *ultra vires*. (*Ohio & M. R. Co. v. McCarthy*, 96 U.S., 267; *Curtis v. Gokey*, 68 N. Y., 300; *Elkins v. Camden & Atlantic R. Co.*, 36 N. J. Eq., 241; Wood, *Law of Railroads*, 526; Boone, *Corp.*, 43.) This case is clearly within the rule recognized in the authorities cited. The district court evidently found against the intervenors on the question of the validity of the mortgages and with that finding we are entirely satisfied.

3. The next question, and the one to which most prominence is given in the brief of intervenors, is whether the mortgages are void by reason of the fact that the plaintiffs were directors of the company at the time the indebtedness was incurred and when the mortgages were executed. It should be observed in this connection that two of the plaintiffs, to-wit, Guthman and Lewis, were acting as president and secretary respectively, and as such executed the mortgages in behalf of the company. There is no claim made of fraud against the plaintiffs. In fact their conduct throughout proves that they were actuated by no motives but to promote the success of the company and the interest of the stockholders. It is not disputed that the business of the company was conducted from the beginning with money raised by these and other directors upon their personal obligations. And, from the facts disclosed by the record, the inference is irresistible that said money was advanced, and that the mortgages to the plaintiffs were executed with the knowledge and approval of the stockholders, including the intervenors. For instance, we find that

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since the first day of August, 1885, thirty-five different notes were executed by these plaintiffs (with the exception of E. B. Lewis, whose name appears on but sixteen thereof), amounting in the aggregate to more than \$150,000. Many of the notes mentioned, it seems, were renewals of others as they matured, and although the amount thus advanced upon the credit of the directors is not clear from the proofs, there is no doubt that said notes were all executed for the accommodation of the company, and the proceeds thereof used in the transaction of its business. At the regular meeting of stockholders in January, 1886, two of the intervenors, Wm. Nevill and C. M. Weed, were elected directors, and during the year following each signed a number of the notes above described, with other directors, and must have been aware of the resources of the company, and the advances which were being made to it on the credit of the directors. It is hardly an exaggeration to say that the lending to the company of their personal credit appears to have been one of the recognized duties of the managing directors.

On the 25th day of June, 1886, F. R. Guthman, E. B. Lewis, J. V. Weckbach, Fred Gorder, F. E. White, A. W. McLaughlin, C. M. Weed, and Henry Boeck being liable for debts of the company to the amount of \$16,000, a mortgage was executed by it in favor of said parties on the following property, to-wit: "The whole plant of said Plattsmouth Canning Company, buildings, machinery, material on hand and manufactured and in process of manufacture, engines, boilers, and manufactured goods in store, and product of the works as rapidly as the same is manufactured." In said mortgage, among other recitals, is the following: "The said canning company being in need of money to enlarge and extend its works and business, and having borrowed the same upon notes with indorsements of the mortgagees, this mortgage is given to said mortgagees as indorsers and sureties for said canning company

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to save them harmless upon such indorsements." Said mortgage was acknowledged in behalf of the company by F. R. Guthman, president, and C. B. Lewis as secretary, and filed for record in Cass county on the 28th day of June, 1886.

We also find the following record of a meeting of the directors under date of December 28, 1887: "Board met at 11 o'clock A. M., and was called to order by the president. Present, Guthman, Davis, Gorder, Weckbach Donnelly, and Lewis. Minutes read and affirmed. * * * Fred Gorder was appointed as a committee to attend to having a new mortgage made out to take the place of one now on file, securing F. R. Guthman, Fred Gorder, J. V. Weckbach, G. A. Davis, and E. B. Lewis in the sum of \$9,500 on the entire plant and stock of the canning company, and they have personally secured to the First National Bank for a loan to the canning company for that amount. E. B. Lewis, secretary."

The mortgages set out in the petition were executed pursuant to the authority shown by the foregoing record, and the prior mortgage therein mentioned is the one bearing date of June 25, 1886, to which reference has been made. The only one of the intervenors who positively denies knowledge of the mortgages is Weber, and we think in view of the undisputed facts in the case he should not now be heard to question this legality. He, in common with other stockholders, must have known from the amount of the company's business that it was obtaining large sums of money from some source and beyond its power to secure except by mortgaging the canning factory and fixtures. It is also in evidence, and not seriously questioned, that at each annual meeting of the stockholders a statement of the assets and liabilities of the company was exhibited and the books examined. When we take into consideration also the fact the validity of the mortgages was first called in question by the intervenors' answer in April, 1890, it is evi-

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dent that the claim of the latter that the execution thereof was without their consent is not entitled to serious consideration. There is no doubt that the relation of directors to the corporation of which they are officers is of a fiduciary character, and their contracts and dealings with respect to the corporate property will be carefully scrutinized by the courts. There are to be found cases in which it is asserted that such contracts are absolutely void and not enforceable, either in courts of law or equity, but the decided weight of authority, as well as the more satisfactory reasoning, sustains the view that they are voidable only.

It is frequently said in the reports and text-books that contracts between corporations and their directors will be set aside by courts of equity at the election of the stockholders, but such statement is not strictly accurate. Not every purchase of corporate property by the directors of the corporation will be adjudged void in an action by the stockholders even by courts of equity. On the contrary, the relation of directors to the stockholders of a corporation is not essentially different from that ordinarily existing between trustee and *cestui que trust*. Courts of equity will set aside such contracts on the ground of fraud, and generally upon slight showing of fraud or bad faith by the trustee. But where it is clear that the transaction was in good faith, and the *cestui que trust* being under no disability has received and retains the consideration paid for the trust property by the trustee, it will be upheld when assailed either at law or in equity.

In the case of *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 589, which is directly in point, Mr. Justice Miller uses the following pertinent language: "While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corpora-

tion when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given."

The view expressed in the foregoing quotation is abundantly supported by authority. (See *Buell v. Buckingham*, 16 Ia., 284; *Hallam v. Indianola Hotel Co.*, 56 Id., 178; *Garret v. Burlington Plow Co.*, 70 Id., 697; *Smith v. Lansing*, 22 N. Y., 520; *Duncomb v. New York, H. & N. R. Co.*, 84 Id., 190; *Welch v. Importers & Traders Nat. Bank*, 122 Id., 177; *Omaha Hotel Co. v. Wade*, 97 U. S., 13; *Stratton v. Allen*, 16 N. J. Eq., 229; *Sims v. Street R. Co.*, 37 O. St., 556; *Busby v. Finn*, 1 Id., 409; *Stark v. Coffin*, 105 Mass., 328; *Holt v. Bennett*, 146 Id., 437; *Saltmarsh v. Spaulding*, 147 Id., 224; *Beach, Private Corp.*, 242, 245.)

There is nothing in the claim of the intervenors to entitle them to especial consideration at the hands of a court of equity. They, by their conduct, to say the least, sanctioned the use by the canning company for two years and a half of large sums of money procured on the credit of plaintiffs and the execution of the mortgages mentioned as security. Had the business continued prosperous as it was during the first year, when a dividend was declared and paid in stock of the company, it is not probable that the action of the directors would ever have been called in question. Having taken their chances of profits from the investment of money raised by pledging the company's property, they should not now, after misfortune has overtaken their venture, be permitted to repudiate the acts deliberately ratified if not induced by them.

4. There is a further contention by the intervenors, viz., that the plaintiffs, as managing directors, failed and neg-

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lected to give notice as required by law of the indebtedness of the company, by reason of which they have become liable for the amount of its debts upwards of \$4,000. We think the answer fatally defective for the reason that no facts are alleged therein to show that any part of said indebtedness was contracted during the time plaintiffs were in default of the statutory notice. (*Smith v. Steele*, 8 Neb., 115.) Nor is there any evidence in the record to support a finding that intervenors as stockholders have become liable for any indebtedness of the company by reason of the failure to give such notice. We are satisfied that the decree of the district court is right and should be

AFFIRMED.

THE other judges concur.

W. J. STEWART, APPELLEE, V. GEORGE A. STEWART ET AL., APPELLEES, AND THE GERMAN NATIONAL BANK OF HASTINGS, APPELLANT.

FILED MARCH 29, 1893. No. 4638.

Voluntary Assignments: CHATTEL MORTGAGES: FRAUD.
Where a chattel mortgage was made and taken by a creditor of the mortgagor upon all his property, its purpose being not only to secure a debt due the mortgagee, but also to secure other creditors of the mortgagor not named therein, whose rights are not expressly reserved from the operation of the assignment law of this state, such mortgage is *held void as an irregular, prohibited voluntary assignment.*

APPEAL from the district court of Adams county.
Heard below before GASLIN, J.

Batty, Casto & Dungan, for appellant.

Capps, McCreary & Stevens, Tibbets, Morey & Ferris, Hewitt & Olmstead, M. A. & J. C. Hartigan, Bedford Brown, J. B. Cessna, and W. P. McCreary, contra.

RYAN, C.

On January 8, 1890, George A. Stewart executed upon his stock of furniture three several chattel mortgages, one to the German National Bank of Hastings, Nebraska, to secure the payment of \$4,964.44; one to John R. Stewart, his brother, to secure payment of \$2,150, the third to his father, W. J. Stewart, to secure the payment of \$4,930, which several mortgages were the same afternoon duly presented for record by the same person, who, to emphasize the order of priority recited as coincident with above enumeration, and the recitals in the mortgages themselves of the priority of each, caused them to be filed by the county clerk with slight intervals between, in the order named. On the same day there was filed by W. J. Stewart his petition to foreclose said mortgage in his favor in the district court of Adams county, Nebraska, against George A. Stewart, the German National Bank of Hastings, and John R. Stewart. This petition recited that said mortgages were liens in the order of above enumeration, but that said mortgagees having gone into possession at one and the same time, each with the other, there was no priority of possession as between them, and furthermore the plaintiff made known that if either defendant mortgagee should obtain sole possession that such possession would be so used as to cause a sacrifice of the mortgaged property and render worthless the mortgage to the plaintiff. This petition further averred that George A. Stewart was wholly insolvent.

To this petition the defendants filed a written appearance by themselves or attorney on January 8, 1890. On the same day there was given defendants notice of an ap-

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plication for a receiver to be presented to Hon. Wm. Gaslin at 6 o'clock P. M. of said day, by whom at said time a receiver of the mortgaged property was on said petition and due proofs appointed. As between the above named parties issue was duly joined by answers praying the foreclosure of the mortgage of each mortgagee above named.

In due time some twenty-seven different parties, claiming to be creditors of George A. Stewart, intervened in the action, and by pertinent pleadings challenged the *bona fides* and validity of said several mortgages. On the final hearing of the case the contention of the said intervenors was sustained, and the rights of said mortgagees to the proceeds of the sale of the mortgaged property in the hands of the receiver—said property meantime having been sold under order of said court—were decreed inferior to those of Stewart's unsecured creditors. The net proceeds of this sale do not equal the sum secured by the mortgage to the German National Bank, hence the controversy is narrowed down to a contest between the unsecured creditors of George A. Stewart and said bank as to the *bona fides* and validity of said mortgage.

The evidence shows that on January 8, 1890, there was due from George A. Stewart to Sanford Idell, one of his clerks, \$95; to Frank Leonard, another clerk, about \$764.60. Mr. Dietrich, president of said bank, testified that at said date he was getting uneasy as to the claim due from G. A. Stewart to the bank, and asked Stewart to give security, which Stewart agreed to, but wanted Leonard paid; that witness took his note for that amount and told the clerk to place it to Leonard's credit. The same was done as to Idell. Stewart said he owed Mr. Batty \$400, which with an overdraft of \$147.14, made up one note. These three items of \$95, \$764.60, and \$547.14 were included in the mortgage to said bank. The trial of this cause was on September 18, 1890, and the president of said bank then testified that about six weeks before that time

witness had said to Mr. Leonard, in substance, that the bank had been forced to advance this money to Stewart to get him to give security. "Now," said he, "if you are willing to share the loss with us, as we are coming out short, we would like it." That Leonard said he would do what was fair, and he made his proposition and it was accepted. "He came," said the witness, "at my request to the bank after the receiver had made his report." W. H. Fuller, cashier of the German National Bank, testified that this \$764.60 was placed to the credit of Mr. Leonard on December 12, 1890, and that on the 12th of the same month Mr. Leonard drew out \$60. On July 31st he turned over to the bank \$354.60, then on September 5 1890, he came in and said he had turned over to the bank more than he intended to by \$40, and asked that the bank give him credit for \$40, which was done. As to the claim of Mr. Idell, this witness testified that the amount due him (\$95) was placed to his credit with the bank December 12, 1889; that on July 31, 1890, Idell took from the bank \$50 and paid back the balance to the bank. He indorsed the certificate of deposit for \$95. The bank had that certificate. Each amount retained from Leonard and Idell respectively was placed to the interest account of the bank. W. A. Dilworth testified that in June or July, 1890, he went to the bank on behalf of Mr. Idell; that the cashier, Mr. Fuller, said the money was secured in a mortgage from Stewart to the bank and would be paid as soon as the money was realized under the mortgage. Mr. Idell himself testified that he was never told that the \$95 was deposited to his credit; neither did he know it was there to pay his account against Stewart. He was told at the bank that he would be paid when the goods were sold. He said, "I called at the bank after last court was over and Fuller offered me \$50—did not tell me any money was there for me, and as I had waited so long I concluded to take \$50. He said the matter was in litiga-

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tion, and that the bank was coming out short and my account could not be paid in full."

In relation to his claim, Mr. Leonard testified that he was never told that it was deposited subject to his order; that he went into the bank to borrow \$60, and asked the cashier first and was referred to the president, who said witness could have it. Witness offered to give security on a horse and buggy and anything else witness had. The president of the bank said to witness that he need give no security, just give his check for \$60, which was done, and that amount was paid witness thereon. This witness said that the president of the bank told witness to hold on and he would secure him his money. After the goods had been sold the bank officers told witness sufficient money to pay witness was not there and that witness would have to lose it; afterward, being sent for, witness went to the bank and Mr. Fuller offered witness \$350 for his claim; the president, upon his refusal to accept the above, offered \$400; finally, being refused as to less, the president offered \$450, and the witness, rather than take nothing, accepted that offer. Mr. Dietrich, the president of the bank, told this witness that possibly witness would get nothing out of the security taken by the bank. Mr. Dietrich informed this witness that his claim was secured in the mortgage shortly after the failure. Mr. Dietrich, being recalled, said that soon after Stewart had given the various notes witness told Mr. Leonard his account was taken care of.

As to the amount due Mr. Batty, there is no question made that the note of \$547.14 secured by the mortgage to the bank was to cover \$400 to be paid to Mr. Batty, and the balance was to take up an overdraft of Mr. Stewart due the bank. If this last was the only matter for consideration there would be no difficulty in upholding the mortgage to the bank. Unfortunately, the Idell and the Leonard matters present greater obstacles, for while the cashier and president would have it believed that this

mortgage was taken to secure money actually advanced by the bank for and devoted to the payment of these claims, the clear preponderance of the evidence is against them. Without doubt the mortgage was given and taken to secure not only debts due to the bank, but it was executed to secure the claims of Idell and Leonard. Had this been done by a mortgage to each party beneficially interested, the same questions need not have arisen as to the validity of the mortgage to the bank. But this was not done. The bank, as trustee for Idell and Leonard, received the mortgage in part to secure these two claims. There can be no question, upon the evidence, that the mortgage to the German National Bank covered all the property of George A. Stewart to which his creditors could resort for the payment of the several debts due them.

Commenting upon a similar state of facts in *Bonne v. Carter*, 22 Neb., 518, MAXWELL, J., said: "If a debtor is unable to pay his debts in full, it certainly is but justice that each creditor should be paid a fair proportion of the entire assets of such debtor. Any other rule carries upon its face the stamp of unfairness, and should as far as possible be discouraged. The general assignment law of the state prohibits preferences, except in certain trifling matters, and but for the first section of that act no doubt would control in this case. A debtor who by any instrument transfers all his property to one or more creditors or other persons for their benefit has in fact *assigned it*. So far as his right, control, and possession of the property are concerned they have passed to others and are not to be returned to the debtor until the purposes of the trust are accomplished; and then only the residue of the property is to be returned. No refinement of definition can make such a transfer essentially different from an assignment."

Obviously this language is applicable to the facts clearly established by the testimony in this case, and the mortgage in question, having been made, and taken upon all of the

Pounder v. Ashe.

mortgagor's property in secret trust for Idell and Leonard as well as to secure the bank's claim, was in contravention of the provisions of the assignment law of this state. It therefore follows that the judgment of the district court must be

AFFIRMED.

LEVINE C., concurs.

RAGAN C., having been of counsel, took no part in the consideration or determination of this case.

36 564
44 673

**JOSEPH J. POUNDER ET AL., APPELLANTS, V. J. P. ASHE
ET AL., APPELLEES.**

FILED MARCH 29, 1893. No. 4973.

1. **Religious Societies: REGULARITY OF ECCLESIASTICAL PROCEEDINGS: REVIEW.** When rights of property are in question, civil courts will inquire whether or not the organic rules and forms of proceedings prescribed by the ecclesiastical body have been followed.
2. ———: ———: ———: **PROPERTY RIGHTS.** When tested by such organic rules and forms, it is found that the proceedings of an ecclesiastical tribunal were without jurisdiction, such proceedings will be held void in so far as such proceedings necessarily and directly involve property rights.
3. ———: **PROCEEDINGS TO REMOVE CLERGYMAN: REVIEW.** The proceedings, whereby it was sought to exclude one of the defendants from his clerical functions, examined and held not to be in accordance with the procedure established by the church discipline in question.

APPEAL from the district court of Seward county. Heard below before BATES, J.

Norval Bros. & Lowley, for appellants:

The civil courts having no ecclesiastical jurisdiction, cannot review or question ordinary acts or church discipline, or excision, and only have judicial power in cases arising from conflicting claims of parties to the church property and the use of it. The civil courts cannot decide who should be members of the church, nor whether those excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church, and the decision of the church or church judicatory is binding upon the courts upon all such questions. (*Gaff v. Greer*, 88 Ind., 122; *State v. Farris*, 45 Mo., 183; *Robertson v. Bullions*, 9 Barb. [N. Y.], 64, 134; *German Reformed Church v. Seibert*, 3 Pa. St., 282; *Gibson v. Armstrong*, 7 B. Mon. [Ky.], 481; *Harmon v. Drehrer*, 1 Spear Eq. [S. Car.], 87.) It is the duty of a court of equity where a disturbance is threatened, or where the church is being used or attempted to be used for a different purpose than that for which it was intended, to interfere by injunction and restrain such unlawful use. (*Baker v. Ducker*, 79 Cal., 365; *Brown v. Monroe*, 80 Ky., 443; *Hackney v. Vauter*, 39 Id., 615; *Rottman v. Bartling*, 22 Neb., 375.)

Ed. P. Smith, *E. B. Esher*, and *E. C. Biggs*, contra:

Where property rights are involved civil courts have authority to inquire into the jurisdiction and regularity of ecclesiastical tribunals. The decree of a church judicatory is binding only when it is affirmatively shown that it has acted within the scope of its authority and has observed its own organic forms and rules. (Beach, *Private Corporations*, secs. 85-92; High, *Injunctions*, sec. 308; *Walker v. Wainwright*, 16 Barb. [N. Y.], 486; *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal., 308; *Smith v. Nelson*, 18 Vt., 511; *Watson v. Avery*, 2 Bush [Ky.], 335; *Fritz v. Muck*, 62 How. Pr. [N. Y.], 69; *Common-*

Wealth v. German Society, 15 Pa. St., 251; *Keer's Appeal*, 89 Id., 112; *Jones v. State*, 28 Neb., 497; *Chase v. Cheney*, 58 Ill., 509; *O'Hara v. Slack*, 90 Pa. St., 490.)

RYAN, C.

This action was begun in the district court of Seward county by the appellants to restrain the appellees from using a certain church building for religious exercises conducted by defendant Ashe. The controversy focuses about the right of said Ashe to officiate as a clergyman of the church of Mount Zion of the Beaver Crossing Mission of the Evangelical Association of North America. It is not disputed that Mr. Ashe was assigned to this charge by the annual conference of said association in March of the year 1890, and that at the commencement of this action his term had not ended by its own limitation. Incidentally the regularity of the proceedings of said annual conference were questioned because, as insisted, the discipline of said association required the bishop, if present, to preside thereat, a requirement, if such it was, more honored in the breach than in the observance. This contention is noted, not because strictly necessary to a decision of the matters really in controversy, but that proceedings hereinafter referred to may be the better understood. There is no serious disagreement as to the facts of this case; at least such facts as are not controverted will suffice for the determination of this appeal.

From the pleadings it is not open to question that the annual conference aforesaid assigned Mr. Ashe to the charge now in controversy, and said pleadings admit that Mr. Ashe was exercising said functions until this action was begun. By injunction it was sought to terminate such functions upon the ground that Mr. Ashe had been subsequently to his said assignment duly suspended and himself deposed from his ministerial position. Involving as this does the conflicting claims of parties to the church property and the

use of it, civil courts have jurisdiction to try and determine such claims subject to certain limitations fixed and observed by such courts. It is indispensable to the existence of church organization, discipline, and efficiency that civil courts refrain from the usurpation and exercise of judicial functions properly inherent in ecclesiastical authorities, hence a reference to the decisions of some of the courts of last resort bearing upon that subject will not be unprofitable.

In *O'Hara v. Stack*, 90 Pa. St., 490, it was held that when rights of property are in question civil courts will inquire whether the organic rules and forms of proceedings prescribed by the ecclesiastical body have been followed.

The supreme court of Vermont has held that the proceedings of the synod of the Presbyterian church as a court of last resort are not absolute or conclusive when they come in question, whether directly or collaterally, in a court of law, but that such proceedings may be inquired into upon the same principles as subject the proceedings of voluntary associations to inquiry and adjudication. (*Smith v. Nelson*, 18 Vt., 511.) This doctrine was stated with approval in *Watson v. Avery*, 2 Bush [Ky.], 332, and is without doubt the consensus of judicial opinion.

There is not entire harmony as to the exact language of the charges and specifications upon which was predicated the removal of defendant Ashe, but as the difference is more in matters of mere form than in substance, the copy attached to the bill of exceptions is taken as sufficiently exact for the purposes under consideration. It is as follows:

“BEAVER CROSSING, June 4, 1890.

“I, A. W. Schenberger, presiding elder of the Blue Springs district of the Platte River conference of the Evangelical Association, do prefer charges against Rev. J. P. Ashe, for actions and sayings unbecoming a minister and which has caused dissensions and disturbed the peace,

and harmony, and prosperity of our society at Beaver Crossing.

"Specification A. In having certain resolutions passed by the board of trustees of the church which caused great dissatisfaction, which is contrary to the discipline.

"Specification B. In misrepresenting the interest and action of the Platte River conference, and especially at its last session, and the interest of the members of the society at Beaver Crossing by intimidating on the finance.

"Specification C. In neglecting or refusing to observe our book of discipline, as found on page 67, question 96, answer 2, also in answer 4, in lines 2 and 3 at the top of page 68, in book of discipline.

"A CHARGE FOR IGNORING HIS SUPERIOR IN OFFICE AND DECEPTION.

"Specification A. On Monday, June 2, he told me that he did not recognize me as a presiding elder nor a member of the church since last conference. Same night in the church he said I was no elder and that he would not accept any charge from me.

"Specification B. In practicing deception in keeping me ignorant of what he was influencing the trustees to do. Giving the wrong advice to the members, which is an open violation of discipline, as found on page 71, answer 8.

"Specification C. In practicing deception with me inasmuch as he was told by ex-Bishop Esher at the last annual conference that he, Ashe, should stay at Beaver Crossing Mission and then some time in the future he should come over to ——— and bring the church property and people with him.

"Specification D. In communing with me on Sabbath, the first of June, also recognized me to hold quarterly conference on Saturday previous and do business, and then on the following Monday told me I was no P. E., neither member of the church.

"To J. P. Ashe.

A. W. SCHENBERGER."

Upon these charges and specifications a trial was had June 15, 1890, before a committee composed of five elders, presiding elder Anthony, of an adjacent district, presiding. The accused was by this committee found guilty upon each specification. These proceedings were afterward ratified by the annual conference, though no appearance thereto was made by Mr. Ashe, neither, so far as the record shows, had he any notice of such proposed action by the conference, nor was there any appeal.

This condition of affairs requires an examination of the discipline of the Evangelical Association of North America to determine which contention is correct as to the jurisdiction of the committee by whom Mr. Ashe was tried and suspended.

The appellants contend that the committee had jurisdiction to hear and determine these charges and specifications, and if they were sustained by proofs, to suspend Rev. Ashe from his official functions. On the other hand, the appellees deny this jurisdiction. These diverse views depend wholly for their importance upon the provisions of the "Discipline, part VI, ch. 2, sections 119 and 120 respectively. These sections, so far as applicable, are as follows:

"§ 119. Ques. What shall be done if an elder, deacon, or preacher is under report of being guilty of some crime expressly forbidden in the Word of God as an unchristian practice, sufficient to exclude a person from the kingdom of grace and glory?

"Ans. 1. In case there be no bishop present the presiding elder shall call in as many ministers of the church as he shall think proper, yet not less than three, and bring the accuser and accused face to face. If the accused be clearly convicted of the alleged crime, he shall be suspended from all his legal functions or excluded according to the nature of the offense until the next annual conference, which shall finally decide the case. * * * But in case a pre-

siding elder has charges against a preacher in his district the trial shall be conducted, in the absence of the bishop, by the presiding elder of an adjacent district.

"§ 120. Ques. What shall be done in case of improper words, actions, or temper?

"Ans. The accused shall be reprimanded by his senior in office. Should he repeat the same transgression, then one, two, or three preachers are to be taken along as witnesses to enforce a second reproof. If he be not then cured of the evil he shall be tried at the next annual conference. And if found guilty and incorrigible, he shall be excluded."

The language in section 119, *supra*, which follows the word "crime," requires that not only must the offense be a crime but it must be one expressly forbidden in the Word of God, as an unchristian practice, sufficient to exclude a person from the kingdom of grace and glory. Of these qualifications of the word "crime," civil courts obviously have no jurisdiction. The definition of the word "crime," however, is not peculiarly or exclusively of ecclesiastical cognizance. That word has a generally accepted, clear, legal meaning, and where individual rights or interests in property hinge upon the definition of this word such meaning must prevail.

In Anderson's Dictionary of Law the word "crime" is thus defined: "An act committed or omitted in violation of a public law either forbidding or commanding it" (citing 4 Blackstone's Commentaries, 5); "a wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding prosecuted by the state in its own name or in the name of the people or the sovereign." (Citing *re Bergin*, 31 Wis., 386.) "Crime and misdemeanor are synonymous terms; though in common usage 'crimes' denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors.' In short, the term 'crime' embraces any

and every indictable offense." (Citing *People v. Police Com'rs*, 39 Hun, 510; 7 Conn., 185; 60 Ill., 168; 32 N. J. L., 144; 9 Wend., 212; 9 Tex., 340; 24 How., 102; 26 Vt., 208; 41 Id., 511.) "Yet it is not synonymous with 'felony.'"

Other law dictionaries adopt the same definition as above given, hence it may be accepted that Blackstone's definition of the word as "an act committed or omitted in violation of a public law either forbidding or commanding it," is full and correct as applied to the charges and specifications upon which defendant Ashe was tried. The word "crime" is a gross misfit. In none of these is there found a single element of a crime, hence a committee constituted as was that which tried Mr. Ashe had no jurisdiction of the offenses charged under said discipline. Possibly the charges and specifications imputed to Rev. Ashe improper words, actions, or temper, in which event he should first have been reprimanded; upon a repetition of the impropriety he should have been reproved a second time in the presence of one, two, or three preachers as witnesses; then, if found guilty and incorrigible at the next annual conference, he should have been excluded. In cases of improper words, actions, or temper the discipline seems to contemplate serious, continued efforts to bring about penitence and reformation, and in case of utter failure in this commendable direction the annual conference must exclude the recalcitrant offender. On the other hand it is only when a crime has been committed that a committee summoned for the occasion may summarily eject the criminal, regardless of reformation or reproof. Improper words, actions, or temper, if not refrained from after due remonstrance, are to be inquired into at annual conference, and not by a committee; and in such class of offenses a committee is wholly without jurisdiction to suspend the offender. The defendant Ashe having been duly assigned to the charge of the church, and at the commencement of this

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action being in the exercise of his official functions, it is not necessary to inquire further into the tenure of his office, for he could be excluded therefrom in the civil courts only by one or more persons showing better right thereto. It follows, therefore, that the judgment of the district court must be

AFFIRMED.

THE other commissioners concur.

36	572
39	574
36	572
41	344
36	572
51	26

**HENRY T. CLARKE, APPELLANT, V. HERMAN KOENIG,
APPELLEE.**

FILED MARCH 29, 1893. No. 4816.

1. **Specific performance** is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court.
2. ———: **CONTRACTS: EQUITY.** A party invoking the equity powers of a court to enforce specific performance of a contract, which he claims is for the sale to him of real estate, must exhibit a contract unambiguous and certain.
3. **Contracts: DEFAULT OF PARTY ASKING FOR SPECIFIC PERFORMANCE.** He who asks a court of equity to specifically enforce what he claims are his rights under a contract, must not himself be in default in his promises in the same contract.
4. **Contract for Sale of Homestead: SPECIFIC PERFORMANCE: HUSBAND AND WIFE.** It is the settled law of this state that the courts will not specifically enforce a contract for the sale of the homestead of a married person, unless such contract is executed by both husband and wife.
5. ———: ———: ———: **VALUE OF PROPERTY.** The value of the property does not change this rule.

APPEAL from the district court of Lancaster county.
Heard below before CHAPMAN, J.

Pound & Burr, for appellant:

When the mode agreed upon for fixing the price is not the essence of a contract to convey real estate, and the agreement is substantially for a sale at a fair price, upon a failure of the parties to determine the amount, the court, looking to the substance rather than to the form of the contract, will adopt some other means of arriving at the price, and of thus carrying out the agreement in its essential features. (*Coles v. Peck*, 96 Ind., 333; *Smith v. Peters*, L. R., 20 Eq. [Eng.], 511; *Kelso v. Kelly*, 1 Daly [N. Y.], 419; *Hermann v. Babcock*, 103 Ind., 461; *Hall v. Warren*, 9 Vesey [Eng.], 605; *Waterman*, Specific Performance, sec. 148; *Fugate v. Hansford*, 3 Litt. [Ky.], 262; *Brown v. Bellows*, 4 Pick. [Mass.], 189; *Pomeroy*, Contracts, secs. 94, 151; *Jackson v. Jackson*, 1 Sm. & Gif. [Eng.], 184; *Dunnell v. Keteltas*, 16 Abb. Pr. [N. Y.], 205.) A contract of sale, or mortgage, is void only as to the homestead value; as to any excess over this value a sale or mortgage is good, since, in respect to this excess, the property is not a homestead. (*Sargent v. Wilson*, 5 Cal., 504; *Kreamer v. Revalk*, 8 Id., 74; *Dye v. Mann*, 10 Mich., 291; *Ring v. Burt*, 17 Id., 465; *Wallace v. Harris*, 32 Id., 398; *Boyd v. Cudderback*, 31 Ill., 113; *Black v. Lusk*, 69 Id., 70; *State National Bank of Louisiana v. Lyons*, 52 Miss., 181; *Swift v. Dewey*, 20 Neb., 107.) Admitting that the contract was void as to the east half of the lot, still it was validated by the subsequent abandonment of that part of the lot as a homestead. (*Brown v. Coon*, 36 Ill., 243; *McDonald v. Crandall*, 43 Id., 231; *Hewett v. Templeton*, 48 Id., 367; *Vasey v. Board of Trustees*, 59 Id., 188; *Hall v. Fullerton*, 69 Id., 448; *Stewart v. Mackey*, 16 Tex., 56; *Jordan v. Godman*, 19 Id., 273.)

G. M. Lamberton, contra:

A court of equity will not enforce specific performance where the value of the land to be conveyed is to be fixed

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by arbitrators. (*Greason v. Ketelas*, 17 N. Y., 499; *Hurst v. Litchfield*, 39 Id., 379; *Hopkins v. Gilman*, 22 Wis., 479; *Gourlay v. Duke of Somerset*, 19 Vesey [Eng. Ch.], 431; *Agar v. Macleu*, 2 Sim. & Stu. [Eng. Ch.], 419; *Milnes v. Gery*, 14 Vesey [Eng. Ch.], 400; *Blundell v. Brettargh*, 17 Id., 231; *Morgan v. Milman*, 17 Eng. L. & Eq., 203; *City of Providence v. St. John's Lodge*, 2 R. I., 46; *Dike v. Greene*, 4 Id., 286; *Coles v. Peck*, 96 Ind., 339.) A contract to convey the homestead will not be enforced unless signed by both husband and wife. (*Larson v. Butts*, 22 Neb., 370; *Betts v. Sims*, 25 Id., 175; *Aultman v. Jenkins*, 19 Id., 211; *Swift v. Dewey*, 20 Id., 107; *Bonorden v. Kriz*, 13 Id., 121.)

RAGAN, C.

This is a suit in equity for specific performance, brought in the district court of Lancaster county by Clarke against Koenig on a contract made between the parties, in words and figures as follows:

"Whereas, on or about the 22d day of June, 1887, the C., B. & Q. R. R. Co. caused to be laid on lot 2, in block 31, in the city of Lincoln, a railroad track, and across R street in said city; and whereas said lot 2 is claimed to be owned by Herman Koenig, and by virtue of a tax deed issued about twelve years ago to one George Dana, and said Koenig, having all the right, title and interest of the said tax deed, under and by virtue of *mesne* conveyance, and the said Koenig claims to be the owner of the said lot by virtue of the possession of the said premises under said tax deed, with all the improvements thereon, amounting as is claimed to about \$800 or \$900, and makes claim to ten years' actual possession of said lot; and whereas said railroad company built said track without obtaining right of way from said Koenig to occupy said lot or having said lot condemned according to law; and whereas one O. P. Dinges claims ownership of said lot by virtue of a

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deed from Arta Morgan, of Denver, Colorado, and whereas the said Arta Morgan claims to be the owner of said lot, she having instituted a suit to set aside a deed made to said Dinges on the ground of fraud claiming to have been practiced by said Dinges, whereas H. T. Clarke is ready and willing to purchase said lot when he shall be able to procure a good title therefor from the legal owner; and whereas there are certain lawsuits now pending in the district court of Lancaster county, Nebraska, concerning the said lots and the titles thereto, between said Koenig, Dinges, and Morgan, wherein all of said claims are made: now it is stipulated on the part of the said Koenig and said Clarke that the said Koenig permits and allows the said track to remain temporarily on said lot for the use and benefit of the said C., B. & Q. R. R. Co., conditioned that the said Clarke, at the termination of the lawsuits concerning the said title to said lot, will pay to said Koenig all the damages he may be justly entitled to for the occupancy of said lot till the termination of the lawsuit, and will either purchase the said lot from the legal owner thereof at said time, or will induce said railroad company to have said lot duly condemned or purchased for the use of said road, said Clarke agreeing on his part not to obstruct or molest said Koenig in the occupancy of said lot any more than may be caused by the passing of cars over said lot, and will not allow said engines, cars, or other obstructions, other than the said track and ties thereunder, to remain standing on said lot. The damages and the amount to be paid said Koenig by said Clarke is to be determined by arbitrators, one to be selected by the said Koenig, and one by the said Clark, and these two to select a third in case of disagreement. This contract and memorandum is signed in duplicate this 22d day of June, 1887.

"H. T. CLARKE,
HERMAN KOENIG.

"In presence of
"L. C. BURR."

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The answer sets up amongst others these defenses:

First—That the contract declared on is not one for the sale of the lot therein described, but for the arbitration and payment by Clarke to Koenig damages by reason of Clarke's temporary use and occupancy of said lot pending litigation over the title to the same.

Second—That the lot at the date of said contract was the homestead—occupied as such—of defendant, his wife, and children, and that defendant's wife was not a party to said contract and did not know of or assent to the same.

Third—A cross-claim for damages for the use and occupation of said lot by Clarke under the terms of said contract.

The court below entered a decree dismissing the suit, and rendered judgment in favor of Koenig on his cross-claim. Mr. Clarke brings the cause here by appeal.

The conclusion reached by us renders it necessary to pass upon only two of the many points presented by counsel in the case.

1. We are of opinion that by the terms of this contract, Clarke, when the courts should have decided in whom was the title, was to pay Koenig such damages as arbitrators might decide he was entitled to by reason of his permitting the railroad track to remain on said lot pending the litigation over the title to the same; and to these damages Koenig would be entitled, even if the courts should decide some one of the other claimants was owner of the lot. It follows, therefore, that the action of the court in rendering judgment for the defendant on his cross-claim was right.

Specific performance is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court. Did the court abuse this discretion in dismissing appellant's suit whatever may be the correct interpretation of this contract? A party invoking the equity powers of a court to enforce specific performance of a contract, which he claims is for the sale to him of real estate, must exhibit

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a contract *unambiguous* and *certain*; in such a contract some one must expressly agree to buy and some one expressly agree to sell. The contract sued on is not such a contract. It is, to say the least, doubtful whether the purchase price of this lot was to be fixed by arbitrators. The appellant was allowed to testify that his understanding at the time was that arbitrators should determine both the purchase price of the lot and Koenig's damages for its occupancy by Clarke; while the defendant was allowed to testify that he understood the contract was only for the arbitration of the damages for its occupancy.

Another essential element is lacking in this contract, viz., the absence of an express promise by Koenig to sell and convey this lot to Clarke. How could he make such promise at the time? The courts might decide that Morgan and Dinges, the other claimants, owned it; so Clarke could not and did not under this contract agree to purchase this lot of Koenig, nor did Koenig agree to sell and convey to Clarke. If the parties had intended that if the litigation over this property terminated favorably to Koenig, then he should sell and convey to Clarke, and he should purchase of Koenig, they would doubtless have so expressed themselves in their contract. This court has no right, however, to so extend the contract of the parties by implication as to inject that clause into it.

By the terms of the contract, Clarke, "at the termination of the lawsuit concerning the title to the lot," was to pay Koenig such damages as he might be found entitled to for the occupancy of the lot by the railroad track during the litigation. This litigation terminated February, 1888, but Mr. Clarke did not pay these damages. He even refused to arbitrate them.

He who asks a court of equity to enforce what he claims are his rights under a contract must not himself be in default in his promises in the same contract. We think, therefore, that the learned judge who tried this case was

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entirely justified in dismissing the appellant's case under any construction of the contract.

2. The undisputed evidence in this record is, that at the date of the contract sued on the lot in question was the homestead of Koenig, his wife, and five children; that they had a small dwelling on the lot in which defendant and his family resided; and that that was their only home. The wife of defendant was not a party to this contract, and there is nothing in the record before us showing any conduct on her part or that of her husband by which they are estopped from claiming this property as a homestead.

In *Larson v. Butts*, 22 Neb., 370, the defendant, a married woman, signed a contract in and by which, in consideration of \$50 paid in cash and \$3,700 to be paid to her, she agreed to sell and convey to plaintiff two lots. She resided on these lots with a minor child at the date of the contract. Her husband was not a party to the contract, and was not living with her. She refused to convey according to her agreement and Larson brought suit for specific performance and obtained a decree as prayed in the district court. Larson appealed here, and Chief Justice MAXWELL, speaking for this court, said: "A contract to convey a homestead entered into by a wife in her own name will not be specifically enforced, as the statute requires the instrument of conveyance to be signed and acknowledged by both husband and wife." This case is decisive of the one we are considering; and it is now the settled law of this state that the courts will not specifically enforce a contract for the sale of the homestead of a married person unless such contract is executed by both husband and wife. The value of the property does not change this rule.

It follows, therefore, that the decree of the district court was right, and the same is in all things

AFFIRMED.

THE other commissioners concur.

STATE OF NEBRASKA, EX REL. J. S. DALES, STEWARD
OF THE UNIVERSITY OF NEBRASKA, V. EUGENE
MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED MARCH 30, 1893. No. 6073.

36	579
37	138
37	508
37	518
36	579
39	514
36	579
46	378

1. **Appropriation for Library Building for State University: AUDITOR OF STATE: VOUCHERS.** Under the provisions of the act making an appropriation for the current expenses of the state for the years ending March 31, 1892, and March 31, 1893, etc., approved April 6, 1891, whereby an appropriation of \$37,000 was made for fire-proof library building at the state university, no part of said appropriation can be drawn except upon proper vouchers filed with the auditor of public accounts.
2. ———: **DISBURSEMENT OF MONEY: DEFINITION OF VOUCHER.**
The term "voucher," when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made.
3. ———: ———: **VOUCHERS.** There is no authority for the secretary of the board of regents of the state university to draw any money appropriated for the university or any of its buildings except upon vouchers duly certified.
4. **Appropriations by Legislature: LAPSE.** No appropriations made by the legislature will lapse before the end of the first fiscal quarter after the adjournment of the next regular session, unless there is a special provision in the act itself providing that if it is not used by a certain time that it shall lapse.
5. The fiscal year begins on the first day of December of each year.

ORIGINAL application for *mandamus*.

J. S. Dales, relator, *pro se*.

W. S. Summers, Deputy and Acting Attorney General,
contra.

PER CURIAM.

This cause is submitted to the court on the following agreed state of facts:

The relator sets forth:

"First—That he is the steward of the university of Nebraska, and secretary of the board of regents of said university, and as such is duly authorized and empowered to draw upon the auditor of public accounts of Nebraska, by proper certificates and vouchers, in due form, for amounts appropriated for the use of the university of Nebraska by the legislature of this state.

"Second—That the legislature of 1891, by a bill approved April 6, 1891, appropriated the sum of thirty-seven thousand dollars (\$37,000) for the use and benefit of the university of Nebraska in the erection of a fire-proof library building (in part).

"Third—That under this appropriation the university authorities entered into a contract, bearing date the second day of July, 1892, with Abraham Rosenberry, of Omaha, Nebraska, in the sum of eighty thousand nine hundred and forty-eight dollars (\$80,948), for the erection of a library building; such building to be completed on or before the first day of December, 1893.

"Fourth—That said Abraham Rosenberry has begun work under this contract, and has completed work and furnished materials and rendered services under said contract to the amount of about twenty thousand dollars (\$20,000).

"Fifth—That the work upon said building was suspended about the middle of December last because of the cold weather, and has not since been resumed for the same reason.

"Sixth—That the said contractor, both by the terms of his contract and by special orders from the university authorities, will continue this work upon the said library

building under the said contract as soon as the weather will permit.

"Seventh—That there is still remaining unexpended of the thirty-seven thousand dollars appropriated by the legislature of 1891, for the purpose aforesaid, as above stated, the sum of twelve thousand nine hundred sixty-eight dollars and two cents (\$12,968.02.)

"Eighth—That this amount will become due the said contractor under the said contract as the work progresses.

"Ninth—The relator further shows that on the 29th day of March, 1893, he drew a certificate, No. 6337, and voucher, in the usual and proper form, upon the auditor of public accounts for twelve thousand nine hundred sixty-eight dollars and two cents (\$12,968.02), being the unexpended balance of said appropriation; that no objection is made by the said auditor to the form nor to the amount of said certificate and voucher.

"Tenth—That the said auditor has returned the said certificate and voucher with a communication in writing to the relator herein, which is as follows:

"LINCOLN, March 29, 1893.

"J. S. Dales, Esq., Steward State University, City—MY DEAR SIR: I return to you herewith university certificate No. 6337, drawn for \$12,968.02, on account of the appropriation made by the legislature of 1891 for the erection of a fire-proof library building (in part). I must decline to pay the same at this time for the reason that it nowhere appears that the work has been done, materials furnished, or services rendered upon which this amount can apply, this being, as I am informed, the unexpended balance of the appropriation. As I understand it, the contract for the erection of this fire-proof library building does not provide for the payment of any moneys by the state in advance. It seems proper that I should also notify you at this time that I must refuse to issue any warrants against

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this fund after March 31, 1893, for the reason that all unexpended balances will then lapse into the state treasury.

"I am very cordially yours,

"EUGENE MOORE,

"*Auditor P. A.*"

"Eleventh—The relator further shows that under this ruling of the state auditor it is impossible for him to now withdraw the unexpended balance of the appropriation in question for the use of said university for payments upon the said contract after work has been resumed, and equally impossible for him to draw the said unexpended balance by other certificates and vouchers at other times hereafter during the progress of said work.

"Twelfth—The relator therefore asks for an order of this court that the said auditor shall pay the amount of twelve thousand nine hundred sixty-eight dollars and two cents (\$12,968.02) upon the presentation of said certificate No. 6337 and voucher, to which reference is made above; or that the court shall order that the said auditor shall honor and pay such other certificates and vouchers as may be drawn upon this fund for payments under the said contract for said library building, as the work progresses, and at such times or within such limits as this court shall direct."

The act approved April 6, 1891, provides "that the following sums of money, or so much thereof as may be necessary, are hereby appropriated out of any money in the treasury, not otherwise appropriated for the payment of the current expenses of the state government for the years ending March 31, 1892, and March 31, 1893, and to pay miscellaneous items of indebtedness owing by the state of Nebraska. * * * "Fire-proof library building (in part), \$37,000.00." * * *

Section 2 of the act provides that "The auditor of public accounts is hereby authorized and required, upon the

presentation of the proper vouchers, to draw his warrants on the state funds, and against the appropriations as made in section one (1) of this act, and in favor of the party performing the service, for the amount due; and such warrants shall give the name of the person and nature of the service."

"Voucher" is defined in the Century Dictionary as follows: "Book, paper, document, or stamp which serves to prove the truth of accounts, or to confirm and establish facts of any kind; specifically, a receipt or other written evidence of the payment of money." The term "voucher," when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, account, etc., which shows on what account and by what authority a particular payment has been made. (*People v. Swigert*, 107 Ill., 495.)

It will be observed that the auditor is authorized to draw his warrant only in those cases where the proper vouchers are presented to him. The warrants are to be drawn from time to time as may be required, the filing of vouchers being the evidence upon which the auditor is to act. There is no authority for the secretary of the board of regents to draw any portion of the appropriation except as he may present vouchers for work or material expended in the prosecution of the contract. The agreed statement of facts, therefore, wholly fails to entitle the relator to draw the money in question and the writ is denied.

But the appropriation does not lapse on the 31st day of March, 1893. It is true the language of the act apparently restricts the appropriations to March 31, 1893, but section 19, article 3, of the constitution provides that "Each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal

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quarter," etc. The construction of this section was before this court in *State v. Babcock*, 22 Neb., 33. In that case an appropriation was made by the legislature of 1885 for the purpose of sinking a well in the salt basin. The succeeding legislature adjourned *sine die* March 31, 1887, and it was held that the appropriation continued until August 31 of that year (citing *People v. Swigert*, 107 Ill., 494; *People v. Lippincott*, 64 Id., 256; *People v. Needles*, 96 Id., 575), unless there is a special provision in the act itself declaring that if the money is not used by a time stated the appropriation shall lapse.

Under the provisions of sec. 9, art. 4, ch. 83, Comp. Stats., the fiscal year commences on the 1st day of December in each year and ends on the 30th day of November. Under the provisions of the constitution, therefore, this appropriation is available until the end of the first fiscal quarter after the adjournment of the present legislature.

WRIT DENIED.

38	564
50	619

CORTELYOU, EGE & VANZANDT V. SARAH F. HIATT.

FILED APRIL 11, 1893. No. 4627.

1. **Action to Recover for Conversion of Note:** PETITION *held* to state a cause of action.
2. ———: TRIAL: OPENING AND CLOSING. Where it is necessary for the plaintiff to introduce any evidence in order to maintain his action he is entitled to open and close.
3. ———: ———: PURPOSE OF ASSIGNMENT MAY BE PROVED. Where a negotiable instrument is assigned as a mere security for a debt, the *purpose* for which the assignment was made may be proved to show the true nature of the transaction.
4. ———: EVIDENCE *held* to sustain the verdict.
5. **Instructions.** No error in the instructions.

ERROR from the district court of Holt county. Tried below before HOPEWELL, J.

H. M. Utley and *E. W. Adams*, for plaintiffs in error :

The plaintiff nowhere alleges that she is or was at the time of the alleged conversion the owner or entitled to the possession of the note which she accuses the defendants of having wrongfully and unlawfully converted to their own use. The petition does not state a cause of action. (Cooley, Torts, secs. 442, 445; *Smith v. Force*, 16 N. W. Rep. [Minn.], 704; *Bond v. Mitchell*, 3 Barb. [N. Y.], 304; *Wright v. Field*, 64 How. Pr. [N. Y.], 117; *Johnson v. Oregon Steam Navigation Co.*, 8 Ore., 35; *Gage v. Allison*, 1 Brevard [S. Car.], 387; *Jones v. Sinclair*, 2 N. H., 319; *Ames v. Palmer*, 42 Me., 197; *Wilson v. Wilson*, 37 Md., 1; *Wheeler v. Train*, 3 Pick. [Mass.], 257; *Fairbank v. Phelps*, 22 Id., 538; *Winship v. Neale*, 10 Gray [Mass.], 383; *Clark v. Draper*, 19 N. H., 419; *Forth v. Pursly*, 82 Ill., 152; *Caldwell v. Cowan*, 9 Yerg. [Tenn.], 262; *Byam v. Hampton*, 10 N. Y. Supp., 372; *Chandler v. West*, 37 Mo. App., 631; *Gill v. Weston*, 110 Pa. St., 305; *Murphy v. Hobbs*, 11 Pac. Rep. [Colo.], 55; *Gates v. Rifle Boom Co.*, 38 N. W. Rep. [Mich.], 245; *Holmes v. Bailey*, 16 Neb., 305; *Bertholf v. Quinlan*, 68 Ill., 297; *Barton v. Dunning*, 6 Blackf. [Ind.], 209; *Kennington v. Williams*, 30 Ala., 361; *Hickok v. Buck*, 22 Vt., 149; *Clark v. Draper*, 19 N. H., 419.) It was error to deny the defendants the right to open and close. (*Osborne v. Kline*, 18 Neb., 351.) It was error to require the jury by special findings to pass upon the law as well as the facts. (Thompson, Trials, sec. 1017; Coke Lit., 155, 156; *Hickey v. Ryan*, 15 Mo., 63; *Fugate v. Carter*, 6 Id., 267; *United States v. Carlton*, 1 Gall. [U. S. C. C.], 400; Wells, L. & F., sec. 2; *Coquillard v. Hovey*, 23 Neb., 627; *Begg v. Forbes*, 30 Eng. L. & Eq., 508; *Etting v.*

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U. S. Bank, 11 Wheat. [U. S.], 74; *First Nat. Bank of Springfield v. Dana*, 79 N. Y., 108; *Edleman v. Yeakel*, 27 Pa. St., 26; *Runge v. Brown*, 23 Neb., 826; *Herron v. Cole*, 25 Id., 704.)

Paris R. Hiatt and O. A. Williams, contra:

The holder of commercial paper pledged as collateral security is not authorized to sell it in the absence of special power. He is bound to hold and collect such paper as it falls due and apply the money to the payment of the debt. (Dan., Neg. Ins., sec. 833; Boone, Mort., sec. 315; *Wheeler v. Newbould*, 16 N. Y., 398; *Union Trust Co. v. Bigdon*, 93 Ill., 458; *Fletcher v. Dickinson*, 7 Allen [Mass.], 23; *Whittaker v. Charleston Gas Co.*, 16 W. Va., 717; *Zimpleman v. Veeder*, 98 Ill., 613; *Joliet Iron Co. v. Scioto Fire Brick Co.*, 82 Id., 548; *Nelson v. Wellington*, 5 Duer [N. Y.], 29; *Alexandria, L. & H. R. Co. v. Burke*, 22 Gratt. [Va.], 262.) The right of property does not pass to the pledgee, but remains with the pledgor, subject to the lien of the former. (Boone, Mort., sec. 309; Williams, Per. Pr., p. 26*; *Franklin v. Neate*, 13 M. & W. [Eng.], 481*; *Farwell v. Importers & Traders Nat. Bank*, 90 N. Y., 488.) If the pledgee of a note held as collateral security cannot collect it, he must return it to the pledgor; and if he surrenders it to the maker without payment, or makes use of it in any transaction of his own, he will be chargeable with its full amount. (Boone, Mort., sec. 311; *Wood v. Matthews*, 73 Mo., 477; *Union Trust Co. v. Bigdon*, 93 Ill., 458.) The mere acceptance by a creditor of a negotiable note of a third person makes it but collateral security. Such acceptance does not operate as payment, unless it be shown that such, at the time, was the agreement of the parties. It will be deemed a conditional and not an absolute payment of the original debt. This is the rule where the note of a third person is given and accepted for a pre-existing debt. (Boone, Mort., sec. 314; *Wilhelm*

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v. Schmidt, 84 Ill., 183; *Noel v. Murray*, 13 N. Y., 167; *Tobey v. Barber*, 5 Johns. [N. Y.], 68; *Kephart v. Butcher*, 17 Ia., 240; *Guion v. Doherty*, 43 Miss., 538; *Shipman v. Cook*, 16 N. J. Eq., 251; *Prettyman v. Barnard*, 37 Ill., 105; *Whitbeck v. Van Ness*, 11 Johns. [N. Y.], 409.) Gross inadequacy of price is always a strong circumstance in favor of the supposition that a sale of the property was not intended. (Boone, Mort., sec. 39; *Campbell v. Dearborn*, 109 Mass., 130; *Reed v. Reed*, 75 Me., 264; *Langton v. Horton*, 5 Beav. [Eng.], 9.) There was a pre-existing debt. The relation of debtor and creditor existed between the grantor and grantee. In such cases the court will treat the conveyance as security. (*Saxon v. Hitchcock*, 47 Barb. [N. Y.], 222; *Hoopes v. Bailey*, 28 Miss., 328; *Henley v. Hotaling*, 41 Cal., 22.) It is competent to show by parol evidence that negotiable paper transferred by endorsement and delivery was intended to be held simply as collateral security, and not absolutely. (Boone, Mort., sec. 310.) The question whether a note or bond is given and accepted in satisfaction of the original debt is for the jury; and it is error for the court to decide it as a matter of law. (1 Thompson, Trials, sec. 1254: *Johnson v. Weed*, 9 Johns. [N. Y.], 310; *Stone v. Miller*, 16 Pa. St., 450; *Sellers v. Jones*, 22 Id., 423.) In case of a conflict of evidence as to whether a note was received as a payment, or merely as collateral, the question is for the jury. (Boone, Mort., sec. 314; *Atlantic Fire & Marine Ins. Co. v. Boies*, 6 Duer [N. Y.], 583.) A sale of collateral security and an appropriation of the entire proceeds amounts to a conversion. (*Cortelyou v. Lansing*, 2 Caine's Cas. [N. Y.], 200; *Clark v. Gilbert*, 2 Bing. N. C. [Eng.], 565; 1 Smith Lead. Case, [7th ed.], 385; *Williams*, Per. Pr. [3d Am. ed.], 27*; *Norton v. Kidder*, 54 Me., 189; *Farrand v. Hurlburt*, 7 Minn., 477; *Latimer v. Wheeler*, 30 Barb. [N. Y.], 485; *Robbins v. Packard*, 31 Vt., 570; *Graves v. Smith*, 14 Wis., 5; *Johnson v. Cumming*, 15 C. B., n. s. [Eng.], 330).

M. F. Harrington, also, for defendant in error.

MAXWELL, CH. J.

This action was brought by the defendant in error to recover for the conversion of a note, and on the trial of the cause the jury returned a verdict in her favor, upon which judgment was rendered. The first objection of the plaintiffs in error is that the petition fails to state a cause of action. The petition is as follows:

"1st. On or about the 2d day of September, 1885, Paris R. Hiatt executed and delivered to this plaintiff his promissory note, dated September 1, 1885, whereby he promised to pay the plaintiff on the 1st day of September, 1888, the sum of \$3,800, with interest thereon at the rate of 10 per cent per annum, payable annually on the 1st day of September of each year. Said note was payable at the Bank of Neligh in the town of Neligh, Nebraska. Plaintiff cannot now give a more accurate description of said note for the reason that the same is not now in her possession, but is in the possession of one Hill, hereinafter named, through the wrongful acts of the defendants as hereinafter set forth.

"2d. To secure the payment of said note said Paris R. Hiatt, on the 2d day of September, 1885, executed and delivered to this plaintiff a mortgage deed, and thereby conveyed to plaintiff the following described premises, situated in the county of Wheeler and state of Nebraska, to-wit: The southwest quarter and the north half of the southeast quarter and the southwest quarter of the southeast quarter of section 2, and the northwest quarter of the northeast quarter of section 11, all in township 24, range 10, west 6 P. M., which premises were on said day owned in fee-simple by Paris R. Hiatt aforesaid.

"3d. Said mortgage deed was duly recorded in the office of the county clerk of Wheeler county, Nebraska, on the 3d day of September, 1885.

"4th. The only incumbrance upon said premises prior, senior, and superior to plaintiff's said mortgage was a certain mortgage for the sum of \$600, hereinafter referred to, and upon which there was only \$570 due February 28, 1887.

"5th. That said \$600 mortgage on said premises was given about May 16, 1884, by the plaintiff and the said Paris R. Hiatt to these defendants for the purpose of securing a certain note for \$600, dated May 16, 1884, and given by this plaintiff to the defendants. A more exact description of said note plaintiff cannot give for the reason that the said note is in the possession of the defendants.

"6th. On the 28th day of February, 1887, plaintiff was indebted to defendants in said sum of \$570, and the said Paris R. Hiatt was indebted to the defendants in the sum of \$48, and the said Paris R. Hiatt and this plaintiff were jointly indebted to the defendants in the sum of \$145.

"7th. On the 28th day of February, 1887, plaintiff, being the owner of and in possession of said \$3,800 note and mortgage securing the same, indorsed the said \$3,800 note in these words: 'Pay to the order of Cortelyou, Ege & Vanzandt. Sarah F. Hiatt.' And plaintiff also assigned said mortgage to the defendants, and after indorsing and signing over said note to the defendants, delivered said \$3,800 note and the mortgage securing the same to the defendants as security for the payment of the said indebtedness owing by the said Paris R. Hiatt to the defendants, and also for the securing the said indebtedness owing by said Paris R. Hiatt and plaintiff jointly to the defendants, and to secure also the payment of the said \$600 note and obtain a release of said \$600 mortgage, thus making the said \$3,800 mortgage a first lien upon said premises, and to secure the payment of the further sum of \$300 borrowed by plaintiff from defendants on the 28th day of February, 1887, but plaintiff never received but \$231.50 of said \$300.

"8th. No part of said \$3,800 note has ever been paid

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by said Paris R. Hiatt, nor any portion of the interest thereon, except the sum of \$600, and said \$3,800 note so secured by said mortgage on the 28th day of February, 1887, at the time plaintiff delivered it to the defendants, was worth the sum of \$3,766.83 $\frac{1}{2}$, and that was its value; and on August 3, 1888, said \$3,800 note secured by said mortgage was worth the sum of \$4,305.74, and that was then its value.

"9th. On the 8th day of March, 1887, defendants caused the said assignment of said mortgage by plaintiff to them to be recorded in the office of the county clerk of Wheeler county, Nebraska.

"10th. On the 3d day of August, 1888, the defendants, being then in possession of said \$3,800 note and mortgage so assigned and delivered to them as security as aforesaid, wrongfully and unlawfully sold, assigned, and delivered the said note and the mortgage securing the same to Edward Hill for the sum of \$4,305.74, and wrongfully and unlawfully converted the entire proceeds of said sale to their own use, to the damage of the plaintiff in the sum of \$4,305.74, no part of which damage has been paid, and all of which is now due from the defendants to plaintiff.

"11th. The defendants are an association of persons doing business in Ewing, Holt county, Nebraska, under the firm name and style of Cortelyou, Ege & Vanzandt, and not incorporated.

"Wherefore plaintiff prays judgment against the defendants for the sum of \$4,305.74, with interest thereon from the time of filing this petition, and costs of suit."

The objection urged to this petition is that it fails to allege that at the time of the alleged conversion of the note she was the owner thereof or entitled to the possession of the same. An examination of the petition however, shows that the objection is not well taken, and it is overruled.

It is claimed that under the issues the defendants below were entitled to open and close. The answer is as follows:

"1. Defendants admit the allegations in the 1st, 2d, and 3d paragraphs of said petition to be true in all respects.

"2. As to the 4th paragraph of said petition, defendants deny the allegations therein contained, and allege that there were taxes due on said premises at that time and that the land had been sold for taxes.

"3. Defendants answering the 5th paragraph of plaintiff's petition admit the facts therein stated.

"4. Defendants answering to the 6th paragraph of plaintiff's petition admit the allegations therein set forth and allege that the indebtedness was more than set out in plaintiff's petition, to-wit, about the sum of \$2,000.

"5. Defendants answering to the 7th paragraph of plaintiff's petition admit that on the 28th day of February, 1887, the plaintiff was the owner of and in possession of a note for \$3,800 and a mortgage securing the same, and that on the said date the plaintiff indorsed said note to the defendants in the words and language used in the plaintiff's petition, and that also, at the same time, the plaintiff assigned the mortgage securing the said note in writing, and delivered the said note and mortgage to these defendants; and defendants deny that said note and mortgage were delivered as security for payment of any indebtedness by said plaintiff, or by said Paris R. Hiatt, husband of the plaintiff, in any manner; but, on the contrary, allege the fact to be that said \$3,800 note and mortgage referred to were, on the 28th day of February, 1887, sold, assigned, indorsed, and delivered to these defendants absolutely, and at that time became the sole and absolute property of these defendants.

"6. Defendants answering to the 8th paragraph of plaintiff's petition admit that no part of said \$3,800 note has ever been paid by Paris R. Hiatt, except the sum of \$600, which said payment was made prior to the time said note was sold and delivered to these defendants, to-wit, on the 1st day of February, 1887; and the defendants further answering to

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the 8th paragraph of plaintiff's petition deny each and every allegation therein contained.

"7. Defendants answering to the 9th paragraph of plaintiff's petition admit the facts therein stated to be true.

"8. Defendants. answering to the 10th paragraph of plaintiff's petition admit the facts to be that on the 3d day of August, 1888, the defendants sold, assigned, and delivered the said note and mortgage to one Edward Hill for a valuable consideration, but deny that they wrongfully and unlawfully assigned the same or converted the same to their own use, and deny each and every allegation in said paragraph contained except that in this paragraph admitted. Deny that they received the sum of \$4,305.74 as the proceeds of sale of said note.

"9. Defendants answering to the 11th paragraph of plaintiff's petition admit the facts therein stated.

"Wherefore these defendants pray that they may have judgment against the plaintiff for the costs of this action and for such other relief as to the court may seem right."

The plaintiff below, in her reply, admits that certain taxes were due on said land but alleges that they were paid by Paris R. Hiatt; denies that the indebtedness set forth in the fourth paragraph of the answer was more than set forth in the plaintiff's petition, and denies each and every allegation contained in the fifth paragraph of the answer. It will thus be seen that the plaintiff below was required to prove certain facts to sustain her cause of action and therefore was entitled to open and close. The rule is this: "That where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him." This rule has been generally adopted in this country. The unvarying test furnished by this rule is to consider which party would, in the state of the pleadings and of the record admissions, get a verdict for substantial damages, if

the cause were submitted to the jury without any evidence being offered by either. If the plaintiff would succeed, then there is nothing for him to prove at the outset, and the defendant begins and replies; if the defendant would succeed, then there is something for the plaintiff to prove at the outset, and the plaintiff begins and replies.

It is claimed that the court required the jury in the first and second of the special findings to pass upon the law as well as the facts. The special findings are as follows:

"1. Was the transaction between the parties of the 28th day of February, 1887, at the time the plaintiff Sarah F. Hiatt assigned and delivered the \$3,800 note and mortgage to the defendants, intended by the said parties at the time as a *bona fide* and absolute sale of said note and mortgage to the defendants?

"Answer. No.

B. F. COLBURN, *Foreman*.

"2. Was the transaction between the parties of the 28th day of February, 1887, at the time of the assignment and delivery by the plaintiff to the defendants of the \$3,800 note and mortgage intended by the parties at the time and were such note and mortgage in fact given to and received by the defendants as collateral security for all indebtedness from the plaintiff and her husband?

"Answer. Yes.

B. F. COLBURN, *Foreman*.

"3. What amount, if anything, was due and owing the defendants by the plaintiff and her husband on the 28th day of February, 1887, at the time of the assignment and delivery of the note and mortgage by the plaintiff to the defendants?

"Answer. \$1,243.

B. F. COLBURN, *Foreman*.

"4. What amount, if anything, was due and owing by the plaintiff and her husband, Paris R. Hiatt, to the defendants on the 3d day of August, 1888, at the time of the sale and conversion of the \$3,800 note and mortgage by the defendants?

"Answer. \$1,367.71.

B. F. COLBURN, *Foreman*.

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"5. What was the value of the \$3,800 note and mortgage on the 3d day of August, 1888?

"Answer. \$4,144.85. B. F. COLBURN, *Foreman*."

It is evident that the court merely required the jury to find the purpose of the transaction, viz., was it a mere security or was it a sale? This purpose was a question of fact which the jury was to find from the evidence. There was no error, therefore, in submitting those questions. In *Collingwood v. Merchants Bank*, 15 Neb., 118, where certain drafts had been purchased from a bank, it was held proper to show by parol evidence the purpose for which they were drawn. The fourth and fifth assignments are merely a repetition of the alleged errors in submitting the questions for the jury to find the purpose. Suppose a deed absolute in form is given as surety for a loan. In form it is a deed, and if a conveyance is made by the grantee thereunder to an innocent purchaser without notice, actual or implied, the title will pass, but as between the parties and persons having knowledge of the nature of the contract the deed is a mere security for the loan, and the wrongful conveyance of the land by the grantee or mortgagee would render him liable. This rule is recognized in *Wilson v. Richards*, 1 Neb., 342, and is applicable to any transaction which in fact is a security. It is claimed that the verdict is contrary to the evidence. It appears that at the time the note and mortgage were assigned to the plaintiffs in error they executed a defeasance as follows:

"This to certify that Cortelyou, Ege & Vanzandt agree to sell said note and mortgage hereinafter described to Sarah F. Hiatt on or after the 1st day of March, 1888, for the sum of \$1,843.58 in case she wants to buy the same by that time, but not afterwards, and it is further agreed that in case said note is not purchased by Sarah F. Hiatt that there shall not be any general judgment against P. R. Hiatt and Sarah F. Hiatt above the sale of said land named in the mortgage, that it shall be in full satisfaction of said

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note which is dated September 1, 1885, due September 1, 1888, for \$3,800 by Paris R. Hiatt to Sarah F. Hiatt secured real estate mortgage on land in Wheeler county, Nebraska, of even date.

"CORTELYOU, EGE & VANZANDT.

"Ewing, February 28, 1887.

"And it is further agreed that on payment of above sum a release of the \$600 mortgage on said land preceding this mortgage shall also be given.

"CORTELYOU, EGE & VANZANDT."

While it is true that this instrument in circumspect language is designated a contract to repurchase the note in question, it is very clear from the accompanying testimony that its purpose was to enable the assignor to redeem upon paying the amount of the loan with interest. This fact is so clearly established that a finding against it would have been against the clear weight of evidence. There is nothing, therefore, in the objections. Objections are made to some of the instructions, but they seem to conform to the proof and it is unnecessary to review them at length. There is no error in the record and the judgment is

AFFIRMED.

THE other judges concur.

EDWARD HOOPER V. R. V. GREWELL ET AL.

FILED APRIL 11, 1893. No. 4847.

Negotiable Instruments: BONA FIDE PURCHASER: EVIDENCE: REVIEW. Where undisputed proof showed a want of consideration for a promissory note, and the proof fails to clearly establish the fact that the plaintiff was a *bona fide* purchaser for value before maturity, a verdict and judgment in favor of the defendant will not be set aside.

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ERROR from the district court of Hall county. Tried below before HARRISON, J.

Abbott & Caldwell, for plaintiff in error.

Hastings & McGintie and *Thummel & Platt*, *contra*.

MAXWELL, CH. J.

On the 2d day of January, 1889, the defendant Grewell made and delivered a promissory note as follows :

"\$90. PLEASANT HILL, Jan. 2, 1889.

"Six months after date I promise to pay to the order of P. Janss, M. D., ninety dollars, at Grand Island, Nebraska, value received, with interest at 10 per cent per annum.
R. V. GREWELL."

There is an indorsement on the note of \$15, February 9, 1889. The plaintiff alleges in his petition that he purchased the same before due for a valuable consideration. Grewell filed an answer as follows :

"Said R. V. Grewell, defendant, for answer to plaintiff's petition herein, says that true it is that this defendant on or about January 2, 1889, executed and delivered to the defendant P. Janss, M. D., his certain promissory note in writing of that date for the sum of \$90, payable six months after date; that said promissory note, so made and delivered by this defendant, did not provide for the payment of any interest thereon, and was not drawn in the terms alleged in the said plaintiff's petition; and if the said note, signed and delivered by this defendant, now provides for the payment of ten per cent interest thereon, as alleged in said petition, then the said note has been falsely and fraudulently forged and altered, and the said note mentioned and described in plaintiff's petition was never signed or delivered by this defendant to any person whomsoever.

"2. This defendant denies that said promissory note, so

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executed and delivered by him as aforesaid to the said P. Janss, was, before the maturity thereof, sold, indorsed, assigned, or transferred by the said Janss to said plaintiff for value, and denies the said plaintiff's purchase of the same, and denies that he, the said plaintiff, paid any value therefor, and denies that the said plaintiff is now the owner and holder of the said promissory note.

"3. This defendant, further answering, says that said promissory note for the sum of \$90, given by this defendant as aforesaid to P. Janss, on or about January 2, 1889, was so given by this defendant on express agreement with the said P. Janss, M. D., that he, the said Janss, should treat medically the wife of this defendant for the period of six months for certain nervous effects and illness, to remove the effect of some severe shocks which this defendant's wife had sustained previously thereto, and that said treatment should be continued by the said Janss for the full space of six months, and if the defendant's wife aforesaid should not by that time become entirely well and cured, that the defendant Janss would continue said treatment till such time as defendant's wife should become entirely sound and well and cured, or should desire no further treatment from the said defendant P. Janss. And it was further agreed between this defendant and said defendant Janss that this defendant should pay to the said Janss for each month of such treatment the sum of \$15, and that the same should be indorsed on the said note, and at the end of the said six months aforesaid the same should be fully paid. And the said defendant Janss did not treat this defendant's wife as had been agreed between the said parties, and did in fact treat her only during a single month after the giving of the said promissory note, for which month the sum of \$15 was duly paid by this defendant, as was by the said parties' agreement provided as aforesaid. And after the said time said defendant Janss wholly failed and neglected and refused to treat the said wife of this de-

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fendant, and wholly failed and neglected and refused to send any medicine or in any manner to carry out and fulfill his said agreement with this defendant, whereby the consideration for the said note has wholly failed, and there is no amount due thereon to the said plaintiff or any other person whomsoever.

"4. That the said plaintiff had full and actual knowledge and notice that the said promissory note was given as aforesaid without consideration received by this defendant long before the alleged purchase of the said promissory note by the plaintiff.

"Wherefore, this defendant asks judgment for costs."

The reply is a general denial. Janss was sued as indorser. The record, however, fails to show that he was served with summons. On the trial of the cause the jury returned a verdict in favor of Grewell, upon which judgment was rendered. It appears that the note in suit was given to Janss under the following agreement:

"PLEASANT HILL, Jan. 2, 1889.

"Received of R. V. Grewell \$—— and a note for \$90, for which I agree to treat Mrs. Grewell for six months, and if not cured at the expiration of that time I agree to treat her until cured, or so long as she may desire treatment, without extra charge. Mr. Grewell agrees to pay \$—— monthly, to be indorsed on said note, and promises to give me timely notice if more medicine is desired, so as to enable me to supply same, and also prompt notice of any change of symptoms or of any change in the effect produced by such medicine. The medicine and appliances to be sent by express.

P. JANSs."

The proof is that he made one visit after the note was executed, for which he was paid \$15. He also sent medicine twice. What, if anything, this medicine was worth does not appear. It is also proved that the plaintiff signed Janss' note for the sum of \$3,000, as surety at a bank

Barker v. Avery.

in Grand Island; that Janss promised to place notes to the amount of \$7,000 in the bank as collateral security for the plaintiff; that notes for a very large amount were placed there for that purpose, but whether the note in suit was placed in the bank at the time the note for \$3,000 was signed is not clearly shown nor perhaps is it material. It also appears that more than \$2,000 was collected on these notes, but Janss was permitted to receive about \$1,300 of the amount so collected. We are led to believe that the plaintiff was anxious to accommodate, if not aid, Janss, and therefore did not insist on a stringent application of the proceeds of the notes to the payment of the one in the bank. The plaintiff claims to be an innocent purchaser of the note in suit, but the proof fails to satisfactorily establish that fact, and the judgment is affirmed. Sufficient facts are alleged in the petition to entitle the plaintiff to a judgment by default against Janss, and if the records in the court below show either service or an appearance, it is probable that such judgment, upon a proper showing, might be rendered even now, but it cannot affect the verdict against the plaintiff in error.

AFFIRMED.

THE other judges concur.

EVA C. BARKER, APPELLANT, v. HENRIETTA E. AVERY
ET AL., APPELLEES.

FILED APRIL 11, 1893. NO. 4745.

38	599
48	527
36	599
49	241
36	599
259	93

- 1. Action to Quiet Title: DEED: FORGERY: EVIDENCE.** In an action to set aside a deed as a forgery, the deed, together with a signature of the grantor, which was admitted to be genuine, and received in evidence, were examined through a micro-

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scope and the signature of the grantor to the deed held to be genuine.

2. ———: ———: ———: ———. The oral testimony tended to prove that the deed was genuine.

3. **Deed: CERTIFICATE OF ACKNOWLEDGMENT: IMPEACHMENT.**
Where a deed is acknowledged in due form before a proper officer, it can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent.

APPEAL from the district court of Hall county. Heard below before HARRISON, J.

John E. Kavanaugh and Steele Bros., for appellant.

T. J. Doyle and W. A. Prince, contra.

MAXWELL, CH. J.

This is an action to quiet the title to lots 4 and 5, in block 22, in Russell Wheeler's addition to Grand Island. The plaintiff contends that a deed for the above lots, signed in her name and acknowledged before one Gearon, a notary public, is a forgery. This is denied by the defendants. On the trial of the cause the court found the issues in favor of the defendants and dismissed the action. The plaintiff testifies that she did not execute the deed in controversy. The original deed which purports to have been signed and acknowledged by her before a notary public is now before us; also her signature to a petition which is admitted to be genuine. We have examined both signatures with a good microscope, and we are constrained to believe that her name on the deed was written by herself. In addition to this a number of experts were called as witnesses in the court below, who, after comparing the signatures, pronounced the name of the plaintiff on the deed to be her genuine signature. In addition to this testimony, we have the certificate of the notary before whom the deed purports to have been acknowledged. In the case of *Phil-*

Rodgers v. Levy.

lips v. Bishop, 35 Neb., 487, it was held that a certificate of acknowledgment of a deed or mortgage in proper form can be impeached only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent. That in our view is a correct statement of the law. The judgment is right and is

AFFIRMED.

THE other judges concur.

JAMES L. RODGERS ET AL. V. MOSES H. LEVY.

FILED APRIL 11, 1893. No. 4663.

1. **Res Adjudicata.** One A brought an action of replevin against B, which was dismissed because A had not legal capacity to sue. *Held*, That the judgment of dismissal for the cause stated did not bar a future action for the same property.
2. ———. Where a cause is dismissed because the plaintiff has not legal capacity to sue, and the defendant thereupon has a jury impaneled to try the right of property which is awarded to him, he thereby cannot bar the plaintiff from maintaining a second action of replevin for the same goods.

ERROR from the district court of Adams county. Tried below before GASLIN, J.

Bowen & Bowen, for plaintiffs in error.

Capps & Stevens, contra.

MAXWELL, CH. J.

This is an action of replevin brought by Levy against Rodgers before J. E. Pierce, a justice of the peace. A change of venue was then applied for under the statute and the cause transferred to Geo. Lynn, a justice of the

Rodgers v. Levy.

peace. A transcript in the case from his docket is as follows:

"October 19, 1889. Come now the parties in this action, plaintiff and defendants in person, and by their attorneys. Defendants file their motion to dismiss said action for the reason that plaintiff has not legal capacity to sue. Motion sustained, with leave to plaintiff to amend by interlineation. To which defendants object. Defense thereupon demand a jury to determine the right of property in action commenced was in the defendants, and we assess the value of said property in the sum of \$160. We also assess the damages sustained by said defendants by reason of the detention of the said property at the sum of \$6.

"DANIEL C. BROWN, *Foreman*.

"It is thereupon considered by me that aforesaid defendants have a return of the property taken on said writ of replevin, and that they recover their damages for the withholding of the same assessed at \$6, or in case a return of said property cannot be had, that they recover of said plaintiff, Moses H. Levy, the value thereof, assessed at \$160, and costs of suit, taxed at \$17.40.

"GEO. LYNN, *Justice Pence*."

Levy thereupon brought a second action of replevin for the same property before a justice of the peace, and it was dismissed because the justice seems to have supposed he had no jurisdiction. The case was appealed to the district court, where Rodgers, in answer to the petition of Levy, filed a general denial. On the trial of the cause a jury was waived and the cause submitted to the court, which rendered judgment as follows:

"On this 7th day of June, 1890, this cause comes on to be heard, and by stipulation of parties in open court a jury is waived, and by agreement made as aforesaid cause is tried to the court on the petition, answer, and reply, and the evidence, and the same being submitted to the court, said court finds that at the commencement of this action the

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plaintiff had a special ownership in the property described in the petition herein, to-wit: 1 black mare about 10 years old, 1 bay horse colt, 1 bay mare about 4 years old. The court further finds that said special ownership is had by virtue of a chattel mortgage given by the defendants herein to A. Loeb, or order, to secure two certain promissory notes of the said defendants herein payable to said A. Loeb, which amounts, principal and interest, to \$89; the court further finds that after the maturity of said notes the defendants herein refused to deliver to plaintiff herein the property described in said mortgage in accordance with the conditions thereof. The court further finds that at the commencement of this action the plaintiff, by virtue of his special ownership, was entitled to the immediate possession of the same, and that the defendants wrongfully and unlawfully detained said property from the possession of this plaintiff. The court further finds that the plaintiff has been damaged by the wrongful detention of said property in the sum of one cent. It is therefore considered and adjudged by the court that the plaintiff recover from the defendants one cent as damages for the wrongful detention of the said property, also his costs herein expended taxed at \$——."

The sole question presented to this court is, does the judgment of dismissal by the justice of the peace in the first action bar a recovery in this? It will be observed that the cause was dismissed for want of legal capacity of Levy to sue. This is not a judgment upon the merits but merely in abatement of that action. Thus, an answer that the plaintiff was *non compos mentis* presents matter in abatement only. (*Jetton v. Smead*, 29 Ark., 372; *Cobbey, Replevin*, sec. 773.) A judgment of nonsuit does not bar the plaintiff from another action for the same cause. (*Hackett v. Bonnell*, 16 Wis., 471; *Westcott v. Bock*, 2 Col., 335; *Daggett v. Robins*, 2 Blackf. [Ind.], 415; *Wells, Replevin*, sec. 781; *Cobbey, Replevin*, sec. 1191.) The action being dismissed as to Levy because of his want of legal capacity

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to sue left the right to the property undetermined, and the fact that a jury was called after the cause was dismissed as to Levy did not operate as a bar to a future action. The judgment is therefore

AFFIRMED.

THE other judges concur.

**ABBIA M. GEORGE, APPELLANT, v. T. EDNEY ET UX.,
APPELLEES.**

FILED APRIL 11, 1893. No. 4444.

1. **Married Women: LIABILITY FOR NECESSARIES FOR FAMILY.** Under the provisions of section 1, chapter 53, Compiled Statutes, which declare "that all property of a married woman not exempt by law from sale on execution or attachment" shall be liable for the payment of all debts contracted for necessities furnished the family of said married woman after execution against her husband for such indebtedness has been returned unsatisfied," the wife is in fact surety for her husband and judgment must be recovered against her before her separate estate can be levied upon and sold for such necessities.
2. ———: ———: **PLEADING.** If from the facts stated in a petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie.

APPEAL from the district court of Buffalo county. Heard below before HAMER, J.

Greene & Hostetler, for appellant.

F. L. Huston and Evans & Thompson, contra.

MAXWELL, CH. J.

A general demurrer to the petition was sustained in the court below and the action dismissed. The petition is as follows:

36 604
48 381
48 903

38 604
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George v. Edney.

"The plaintiff complains of the said defendants and says that said defendants are husband and wife; that on the 17th day of December, 1889, plaintiff obtained a judgment against the said T. Edney in the court of James Nichols, justice of the peace in and for Buffalo county, for the sum of \$200; that said judgment was for necessities furnished by plaintiff's husband, T. Q. George, to said T. Edney, and used in the said family of T. Edney; that said account was duly assigned to this plaintiff before the action was commenced; that after the rendition of said judgment plaintiff procured an execution to be issued against said T. Edney, which said execution was placed in the hands of E. A. Cutting, a constable in said county, and was by him returned unsatisfied for the reason that no goods or chattels or other property of said defendant could be found on which to levy; that said defendant T. Edney has no real estate or other property on which a levy can be made in the state of Nebraska; that said defendant Ida M. Edney, the wife of the said defendant T. Edney, is the owner in fee of the following real estate situated in the county of Buffalo, and state of Nebraska, to-wit: the north half of lots 326 and 327, in school section addition to the city of Kearney, Nebraska. Plaintiff therefore prays the court that said judgment be declared a lien upon said real estate, and that the said land may be sold to satisfy same, and for such other and further relief as may be just and equitable."

Sec. 1, chap. 53, Comp. Stats., provides: "The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall acquire by purchase or otherwise, shall remain her sole and separate property notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for

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his debts; *Provided*, That all property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessities furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same." In other words, the wife is made surety for her husband for the payment of all "necessaries furnished the family of said married woman." She is to be treated like any other surety and must have her day in court before a judgment can be recovered against her. She may be able to show that the goods furnished were not necessities for the family, or that they were sold upon the exclusive credit of her husband, or she may plead and prove any fact that will show her exemption from liability. This being so, her property cannot be subjected to the payment of the claim until judgment is recovered against her. The petition, however, does not entirely fail to state a cause of action. It does appear that judgment was recovered against the husband for necessities for the family; that an execution has been issued thereon and returned unsatisfied; that Ida M. Edney is the wife of T. Edney and possesses the property described which it is in effect alleged is not exempt. This being so, a general demurrer will not lie. It does appear that the plaintiff is entitled to some relief from the defendants, and therefore it must be overruled. The petition must be amended, however, and judgment sought against the wife. Our attention has been called to the case of *Frost v. Parker*, 21 N. W. Rep. [Ia.], 507, where judgment was recovered against the husband alone for necessities furnished to the family and an execution returned unsatisfied, whereupon, without a judgment against the wife, her property was subjected to the payment of the judgment. The Iowa statute is somewhat broader than ours, but we are unable to assent to the reasoning in that case or the conclu-

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sion reached. The wife certainly occupied the relation of surety for her husband, and was entitled to make any defense in her favor that was then in existence. This she seems to have been denied, which is a wide departure from the just rules that generally prevail in that able court. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

FIRST NATIONAL BANK OF DENVER V. HENRY C. SCOTT.

FILED APRIL 11, 1893. No. 4515.

1. **Bill of Sale : GOODS SUBSEQUENTLY MINGLED WITH PROPERTY TRANSFERRED.** The owner of a mill executed a bill of sale to a bank on a large quantity of flour, feed, and other property in the mill. Prior to the execution of the bill of sale the mill owner had ordered several cars of wheat from a warehouse-man in another county, and one car so ordered was shipped one day after the execution of the bill of sale and two days thereafter received at the mill, and a portion or all ground into flour and mixed with the stock in the mill. *Held*, That in no event did the bill of sale cover that wheat, and the person who claimed to be the owner of the mill was liable for the value of the wheat.
2. ———: ———: **REVIEW: HARMLESS ERROR.** Where the proof on the essential facts in the case is practically undisputed and the verdict conforms to the proof, the verdict will not be set aside even if some of the instructions are not entirely accurate.
3. ———: ———. Where personal property, such as wheat, has been delivered to a mill and wrongfully converted into flour and stored with other flour belonging to the mill owner, the owner of the wheat will be entitled to such portion of the flour as the wheat would probably produce.

ERROR from the district court of Webster county. Tried below before COCHRAN, J.

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62 705

Case & McNeny and J. S. Gilham, for plaintiff in error.

St. Clair & McPheely, contra.

MAXWELL, CH. J.

On the 21st of December, 1888, the Red Cloud Milling Company executed a bill of sale to the plaintiff in error on "all the flour, feed, meal, and grain of all kinds, manufactured and unmanufactured, now in the mill, elevator, cribs, and warehouse of the Red Cloud Milling Company, at Red Cloud, Nebraska; 100 head of steers, cows, and calves now in the feed yards of the said milling company; one span of black mares, one set of double harness, one lumber wagon, all grain on track at Red Cloud, Nebraska." At the time this bill of sale was executed there were about sixty tons of flour and a large amount of bran and feed in and attached to the mill. There seems to have been no immediate change of possession. Prior to the execution of the bill of sale the milling company had ordered several cars of wheat from the defendant in error, and on the 22d of that month one car was shipped by him to the milling company from Axtell, Nebraska, and was received on December 24th of that year, and a portion, at least, was ground into flour and mixed with the other flour stored in the mill, and the like mixture seems to have been made of the wheat. The defendant in error thereupon commenced an action by attachment against the milling company to recover the value of the car of wheat, viz., 619⁵⁰/₁₀₀ bushels of wheat at 90 cents per bushel, amounting to \$557.85. The return of the sheriff on the order of attachment is as follows:

"December 29, 1888, received this order, and according to the command thereof I did on the same day, at 11 o'clock A. M., in the presence of H. H. Eckman and Wesley Street, two credible persons, residents of the county, attach the following goods and chattels, to-wit: About

300 bushels of wheat valued at 80c., \$240; 1050 50-lb. sacks of R. C. flour, $\$1.37\frac{1}{2}$, \$1,443.75; 20 50-lb. sacks of White Loaf at $\$1.62\frac{1}{2}$, \$32.50; 130 50-lb. sacks of New Deal at \$1 per sack, \$130; and after administering an oath to said H. H. Eckman and Wesley Street to make a true inventory and valuation of said property in writing, I then with them made an inventory and appraisement of said property, which is herewith returned; I also, on the same day, delivered to said defendant, the Red Cloud Milling Company, by Dwight Jones, president, and R. D. Jones, secretary, a certified copy of this writ. After getting 1,200 sacks of flour I released all wheat, and it was turned back to Dwight Jones, president of the Red Cloud Milling Company.

H. C. SCOTT, *Sheriff*.

"By J. C. WARNER, *Dept.*"

The plaintiff in error thereupon brought an action of replevin and reclaimed the property. The defendant in answer to the petition alleged: "That on or about the — day of —, 188—, the Red Cloud Milling Company, a corporation organized and doing business in and under the laws of the state of Nebraska, was indebted to A. G. Scott & Son in the sum of \$1,000.35 in a cause of action arising upon the purchase by said Red Cloud Milling Company of a quantity of wheat from the said A. G. Scott & Son, and on said last named date the said A. G. Scott & Son commenced an action by attachment against the said Red Cloud Milling Company in the district court of Webster county, Nebraska, and caused an order of attachment for the sum of \$1,000.35 to be issued in said cause and delivered to the defendant, as sheriff aforesaid, for levy; that under and by virtue of said order of attachment, and in pursuance of the command thereof the defendant, as such sheriff, levied upon 1,050 sacks of wheat flour 'Red Cloud Brand,' 20 sacks of wheat flour 'White Loaf Brand,' and 130 sacks of wheat flour 'New Deal Brand,' being the goods and chattels mentioned in said petition herein, and took the same into his custody;

First Natl. Bank of Denver v. Scott.

that said flour was at the time of said levy and still is the sole property of the said Red Cloud Milling Company, and was liable to be levied upon for the satisfaction of said debt and taken under said order of attachment for the satisfaction of the same; that said action is still pending and undecided in said district court; that the defendant, under and by virtue of said writ of attachment, held the possession of said flour until on or about the 27th day of March, 1889, when the same was taken from his possession and custody by C. Schenck, coroner of said Webster county, Nebraska, by virtue of a writ of replevin in this action. Wherefore defendant prays a return of said goods, or if a return cannot be had, then for the value thereof to the extent of said order of attachment, to-wit, \$1,000.35, with interest and costs of suit."

On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of \$557.85 and 1c. damages. They also found the value of the property levied upon was \$1,200.

A number of objections are made on behalf of the plaintiff in error to one of the instructions. In our view, however, these objections are not material, as it is evident that the verdict is the only one that should be rendered under the proof. It is clearly shown that a car of wheat containing 619 $\frac{5}{8}$ bushels was received and placed in the mill after the bill of sale was executed. This was not covered by the bill of sale, and therefore the party using it is liable for its value. The plaintiff in error claims to have been in possession of the mill and was running it when the wheat was received and therefore is liable for the same, and the jury so found. The case is simple and did not require a volume of instructions for the guidance of the jury. Judgment was rendered in the attachment case in favor of the defendant in error before the trial in this case took place, and \$347.50 appears to have been realized from the property attached therein. The judgment

on the attachment in favor of the defendant in error, and against the milling company, was for the sum of \$1,029.35 and costs, from which the sum of \$347.50, amount due from garnishees, is to be deducted. The jury in the case at bar, however, found that as against the plaintiff in error the recovery should only be for the value of the car of wheat.

2. Objections are made to a general levy of the attachment upon the property of the plaintiff in error. We do not care to impute wrong motives to the plaintiff in error in appropriating the wheat. Where a confusion of goods is made fraudulently by one who owns a part thereof, and after being made it is impossible to identify or apportion the property of each owner, the one not at fault will be entitled to the whole. This is upon the principle that a party by wrongfully mixing the goods of another cannot thereby deprive the other of his property or profit by his own wrong. Therefore, it being impossible to separate the mass, he must lose the whole. (*Jewett v. Dringer*, 30 N. J. Eq., 291). But forfeitures are not favored in law, and it must be an extreme case that will justify the taking of the property of one person and giving it to another. Whenever it is possible, therefore, to make a division of the property and give to each one his share a court will make such division. Thus in *Chandler v. De Graff*, 25 Minn., 88, where the plaintiff delivered to the defendant about 20,000 railroad ties in excess of the contract, which the defendant refused to accept, but had mingled the same with those which were accepted so that they were undistinguishable, the plaintiff was permitted to take out of the mass of the ties the number of such excess. The same rule in substance was applied in *Stone v. Quaal*, 29 N. W. Rep. [Minn.], 326; *Arthur v. Chicago, R. I. & P. R. Co.*, 61 Ia., 648; *Inglebright v. Hammond*, 19 O., 337. Although the conversion of the wheat to flour was made without the consent of the defendant in error, yet the property in its changed form is susceptible of a fair division and this

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seems to have been made by the jury. The property being susceptible of an equitable division, and being so divided, the plaintiff in error has no cause of complaint. The judgment is right and is

AFFIRMED.

THE other judges concur.

GUTHRIE & COMPANY V. M. ALICE RAY.

| 36 612
| 57 740|

FILED APRIL 11, 1893. No. 5018.

Subrogation: PAYMENT OF NOTES BY SURETY. One A mortgaged her separate estate to secure loans from a bank in favor of a private corporation to the extent of \$5,000. It was agreed that as each loan was effected the corporation should deposit notes held by it as collateral security for the loan, the security given by it to be merely contingent. A large number of loans were made in this way and notes as collateral deposited with the bank. Afterwards the bank required A to pay the amount due to it. This she did by mortgaging her separate estate, and she thereupon received from the bank the collateral notes held by it. *Held*, That the testimony clearly established the fact that the notes were held by the bank in good faith before due to secure a loan and debt, and that as A, as surety, had paid the same, she was subrogated to the rights of the bank and stood in its place.

ERROR from the district court of Lancaster county.
Tried below before FIELD, J.

A. J. Cornish, for plaintiff in error.

A. G. Greenlee and Marquett, Deweese & Hall, contra.

MAXWELL, CH. J.

In December, 1883, the Ray Plow Company, of Burlington, Iowa, was anxious to obtain advances of money

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from the Merchants National Bank of that place. To secure the bank it was proposed to deliver to the bank security upon the property of the defendant in error to the amount of \$5,000, with this understanding: that the plow company should deliver to the bank from time to time, as it drew money, certain notes received by it in the course of its business. Under this arrangement the defendant in error gave the security, and the plow company from time to time deposited collateral notes with the bank and received money to be used in its business. Under this arrangement the following notes were delivered to the bank as collateral security for said loans: "Note for \$400, dated December 1, 1883, and due June 1, 1884, executed by Guthrie & Co. to the Ray Plow Company. Note for \$500, dated August 26, 1884, due October 1, 1885, executed by Guthrie & Co. to the Ray Plow Company. Note for \$500, dated August 26, 1884, due October 1, 1885, executed by Guthrie & Co. to the Ray Plow Company. Note for \$108.60, dated March 10, 1884, due October 1, 1884, executed by C. A. Hamilton to Guthrie & Co., and by them indorsed to the Ray Plow Company. Note for \$256.50, dated March 10, 1884, due December 1, 1884, executed by Hayzlett & Green to Guthrie & Co., and by them indorsed to the Ray Plow Company. Note for \$256.50, dated March 10, 1884, due January 1, 1885, executed by Hayzlett & Green to Guthrie & Co., and by them indorsed to the Ray Plow Company." The jury returned a verdict in favor of the defendant in error for the sum of \$3,177.63, upon which judgment was rendered. The testimony shows that prior to giving these notes Guthrie & Co. and the Ray Plow Company had entered into an agreement as follows:

"BURLINGTON, IA., Dec. 1, 1883.

"Agreement made and entered this day by and between the Ray Plow Company, of Burlington, Iowa, party of the first part, and Guthrie & Co., of Lincoln, Nebraska, party

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of the second part, whereby the party of the first part does appoint the second party their agents for the sale of their products in the state of Nebraska, excepting —, for a period of one year from this date, and subject to the following conditions: The party of the first part to use all diligence possible towards filling the orders of the said second party promptly and with goods made in a good and workmanlike manner, and subject to the usual printed warranties. To allow the second party a commission of ten per cent on the net sales, said commission to be retained from the proceeds of sales and in the proportion of cash and notes as received. It is agreed that commission on goods returned from any cause and upon such sales as are not collectible are to be refunded to first party. To allow also the amount of freights paid by second party in case quantities and rates to Lincoln, Nebraska, on such goods coming under this contract, said freights to be deducted from the proceeds of sales and allowed as credits on account at semi-annual settlements, July 1st and December 1st.

“The second party agrees to thoroughly canvass the trade in Nebraska covered by this contract, and does hereby make their order for 500 check rowers, including those now on hand, and to make further orders as the trade requires. To sell check rowers only to first-class dealers, both as to care of selling and of operating goods, and of good reputation and ability for payment of their debts. To take all orders upon the blanks furnished by the first party, and to send copies of such orders to first party from time to time. To sell check rowers at such prices as are ruling and current on such checks as the Haworth, Barnes & Joliet, procuring at all times as high prices and as short time as are obtainable. To do all expert work necessary in operating successfully without charge to first party, but to notify first party promptly of such check rowers as are unable to make work satisfactorily, and their failure or neg-

Guthrie v. Ray.

lect to make same work successfully, such check rowers are to be returned or held subject to order and expense of first party. Second party also agrees to make good any defect promptly and as cheaply as possible to the first party whose expense this is. To such first party, their note due October 1, 1884, for one-half of the amount of check rowers as received, but having the privilege of cash payment June 1, for a discount of 10 per cent to apply as credits on their October 1st note, all dealers' notes guaranteed by them at maturity on or about October 1, 1884. To tender an account of sales at close of each month and excess then due (less commission) over the amount of their notes, given to be settled by good dealers' notes, drawn up in good form, and to be sent in as promptly as possible. It is understood that commission allowed by first party to second party covers all charges for selling, receiving, handling, storing, insuring, forwarding, collecting, etc. Second party also agrees to look after and to procure best possible security on such accounts and notes as are given to first party when necessary and without expense to first party. The wagons now on hand to be sold at best prices and terms obtainable, for which a commission of six dollars is to be deducted on amount then due in excess of the \$800 notes, given this day as an advance payment on the seventeen wagons now on hand, is to be settled by dealers' notes as heretofore. Other goods, now in store of Guthrie & Co., subject to the same commissions, terms, etc., and such other goods as may be ordered by Guthrie & Co. to be subject to a special agreement.

"Witness our hands this day above written.

"RAY PLOW COMPANY,

"By GEORGE O. RAY, *Treasurer*.

"GUTHRIE & COMPANY."

The notes in question were delivered to the plow company under said agreement, and by it delivered to the bank as collateral security. The bank required the defendant in

Minneapolis Harvester Works v. Smith.

error to pay the amount due from the plow company, which she did by mortgaging her separate estate, and upon the payment of the debt the bank turned over the collateral notes in its hands to the defendant in error, and she brings this action thereon. There are many questions discussed in the brief of the defendant in error which do not arise in the case and therefore will not be considered. These facts are clearly established by the proof, viz., that the bank was a *bona fide* holder of the notes sued on, and that the defendant in error had in good faith mortgaged her separate estate as surety to secure the loans made by the bank to the Ray Plow Company, and that she, upon paying the amount due to the bank, had received from it the notes in question. These facts being clearly proved, she stands in the same position as the bank, and may recover on the notes. The judgment is right and is

AFFIRMED.

THE other judges concur.

36 616
44 304

MINNEAPOLIS HARVESTER WORKS v. A. SMITH.

FILED APRIL 11, 1893. No. 5109.

1. **Statute of Limitations: FOREIGN LAWS.** Where a person is a resident of another state when a cause of action accrued against him, and afterwards, but before the debt has become barred by the statute of such state, he becomes a resident of Nebraska, the statute of limitations will commence to run in his favor here from the date of his coming into the state, and not before.
2. ———: ———. In December, 1881, the defendant, a resident of the state of Iowa, gave the plaintiff his promissory note due January 1, 1884, and payable in that state. He removed to Nebraska in 1888, and suit was commenced on the note in this state on July 13, 1891. *Held*, The action was not barred.

3. ———: ———: PLEADING. In pleading the statute of limitations of a foreign state, it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on.
4. ———: ———: ———. *Held*, That the petition states a cause of action.

ERROR from the district court of Boone county. Tried below before HARRISON, J.

N. C. Pratt, for plaintiff in error.

J. S. Armstrong, *contra*.

NORVAL, J.

Plaintiff in error instituted its action in the county court of Boone county, to recover the amount due on a promissory note executed by the defendant in the state of Iowa, on the 16th day of December, 1881. The county court sustained a general demurrer to the petition, and the plaintiff not desiring to amend its petition, the court dismissed the action. The plaintiff prosecuted a petition in error to the district court, where the decision of the county court was affirmed. The petition, omitting the title, is as follows:

"Comes now the plaintiff in the above entitled cause, and complains of the defendant, and alleges:

"First—That said plaintiff was on the 16th day of December, 1881, and still is a corporation, duly organized under the laws of Minnesota.

"Second—That the defendant on the 16th day of December, 1881, made his certain promissory note at Wheatland, Iowa, and delivered the same to the plaintiff; said note is hereto attached, marked Exhibit 'A,' and made a part of this petition.

"Third—That by the laws of Iowa the statute provides that an action of debt on a promissory note may be com-

menced within ten years from the time the cause of action accrued.

"Fourth—That the defendant has resided in the state of Nebraska, since the giving of said note and prior to the commencement of this action, for the space of three years only.

"Fifth—That no part of said note has been paid, and there is now due thereon the sum of \$318.75, with interest at the rate of ten per cent per annum from the 16th day of December, 1881.

"Sixth—The plaintiff therefore prays judgment against the defendant for the sum of \$624.41, and interest thereon at the rate of ten per cent per annum from the 13th day of July, 1891."

Attached to, and made a part of, the petition is a copy of a promissory note signed by A. Smith, dated at Wheatland, Iowa, December 16, 1881, due on or before January 1, 1884, payable to the order of the Minneapolis Harvester Works, and calling for the sum of \$316.74, with interest thereon at ten per cent from date thereof until paid.

The sole question presented for review is whether the petition states a cause of action. Counsel for the defendant not having argued the case orally, or filed a brief in this court, we are not positive that we are apprised of the exact ground upon which the county and district courts decided that the petition was defective. Our understanding is that they held that the statute of limitations had run against the note.

We do not think that the action is barred by the statute of this state. By section 20 of the Code of Civil Procedure it is provided that "If, when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the state, or while he is absconded or concealed; and if after the cause of the action accrues he de-

part from the state, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought."

This action was instituted on the 13th day of July, 1891, which was more than seven years after the maturity of the note. But it appears from the petition that the cause of action arose in the state of Iowa, and that the defendant had resided in this state only three years prior to the bringing of this suit. Under the provisions of the section quoted, the statute of limitations did not begin to run against the note in this state until the defendant moved to Nebraska. Since he had not, when suit was brought, been a resident of the state for five years, the note was not outlawed here. The time the note had run after its maturity, until the defendant moved into the state, cannot be added to the time of his residence here in order to create a bar of the statute. (See *Edgerton v. Wachter*, 9 Neb., 500; *Harrison v. Union National Bank*, 12 Id., 499; *Nicholas v. Farwell*, 24 Id., 180.)

Sections 18 and 21 of the Code read as follows:

"Sec. 18. All actions, or causes of action, which are or have been barred by the laws of this state, or any state or territory of the United States, shall be deemed barred under the laws of this state.

"Sec. 21. When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title."

If the statute of limitations of the state of Iowa had run in favor of the defendant while he was yet a resident of that state, then, under the provisions of the above sections, this action must fail. We concede that when a party relies upon a statute of another state to make out his cause of action or defense, he must plead the statute upon which

he depends in the same manner he would any other fact. It will be observed that in this case the petition alleges, and the demurrer admits the truth thereof, "That by the laws of Iowa the statute provides that an action of debt on a promissory note may be commenced within ten years from the time the cause of action accrues." Is the foregoing a sufficient pleading of the statute of Iowa? We think the allegations sufficient to authorize proof of the statute of limitations of that state. The averment is not the statement of a mere conclusion, but of a fact. While it is the better, and safer, practice in pleading the statute of another state to set out a copy thereof in the pleading, yet, we think, it is sufficient to allege the substance of the statute desired. That, at least, was done in the case at bar. If the defendant wished a more specific allegation, he should have moved to make the petition more definite and certain.

If the statute of Iowa is insufficiently pleaded, the presumption would then be, until the contrary was made to appear, that the statute of limitations of that state relating to promissory notes is the same as our own, viz., five years. Inasmuch, therefore, as the petition shows that only four years had elapsed between the maturity of the note and the time the defendant moved to this state, the action was not barred at the time he became a resident here.

It follows from what we have already stated that the judgments of the county and district courts must be reversed, the demurrer overruled, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other judges concur.

JOHN W. FINES V. TUCKER BOLIN.

36	621
651	650
660	444

FILED APRIL 11, 1893. No. 5070.

1. **Chattel Mortgage Upon Growing Crops: NOTICE: LIEN: PURCHASER OF GRAIN WHEN HARVESTED.** A mortgage upon growing corn is not constructive notice to a dealer in grain who, in good faith, in open market purchases such corn from the mortgagor after the same has been husked by the latter and placed in a pile or crib. But the rule does not prevail where the person who assisted in husking the corn afterwards becomes the purchaser, while it is yet in the same pile or crib, and receives it there, having at the time actual knowledge that it is the same corn he helped harvest. In such case the purchaser will take the corn subject to the lien of the mortgage.
2. **Joint Owners of Crop: DEMAND FOR DIVISION: REPLEVIN.** Where corn in a single pile or crib, owned by two tenants in common, is in the exclusive possession of one of such owners, but both being equally entitled to the possession thereof, the other joint owner, if his co-tenant refuses a division when properly demanded, may recover his portion of the grain by an action of replevin.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

Thompson Bros., for plaintiff in error.

Dryden & Main and *W. A. Prince*, *contra*.

NORVAL, J.

The plaintiff in error was plaintiff in the court below. The action was to recover the possession of a quantity of corn undivided. The property was taken by the sheriff under the replevin writ, and delivered to the plaintiff. Upon the trial the jury returned a verdict for the defendant, upon which judgment was entered.

It appears from the bill of exceptions that the plaintiff is the owner of a farm of 160 acres in Hall county, which

Fines v. Bolin.

he leased for the season of 1889 to the defendant and one Oscar Dewitt, jointly. By the term of the lease plaintiff was to receive as rent two-fifths of all the crops and the tenants were to have the remaining three-fifths thereof. About fifty-five or sixty acres were planted to corn, and the remainder of the land was put in oats. A few days after the corn was planted, Dewitt gave the plaintiff a chattel mortgage upon a threshing machine, and on his one-half of the undivided three-fifths of said crop of corn, to secure the payment of an indebtedness of \$159.55 of Dewitt's to the plaintiff, which mortgage was duly filed in the county clerk's office on the day it was executed. There was testimony introduced on the trial tending to show that the defendant was present at the time the mortgage was taken, and that he had actual knowledge of its contents. The defendant, while admitting he was in the office of the notary when the mortgage was drawn, denies positively that he had any notice of what property was described therein.

It is undisputed that after the corn crop had been matured plaintiff's share was gathered by the tenants and delivered to him. The other three-fifths of the corn, amounting to about 1,900 bushels, was husked by Bolin and Dewitt, and piled upon the ground in a single heap; but there was never any division made of the corn belonging to the tenants. Bolin had also placed in the same pile 250 bushels of corn owned by him, which was raised on lands belonging to one Robbins.

On the 16th day of December, 1889, Dewitt sold his interest in the corn and some millet hay to the defendant, and executed a bill of sale for the same. Subsequently Bolin refused to deliver to plaintiff any portion of the corn covered by said chattel mortgage, and this action was instituted, plaintiff obtaining under the writ 1,051 bushels of said corn.

Objection is made to the 5th, 6th, and 7th paragraphs of the court's charge to the jury, which are as follows:

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"5. The jury are instructed that the filing of a chattel mortgage upon personal property in the office of the clerk of the county where the mortgagor resides, is notice to all parties that there is such mortgage, and persons who buy the same take such property subject to such mortgage. You are instructed that the above is the general rule of law, and you are further instructed that if a mortgage is given upon a growing crop of grain, which is afterwards husked or harvested and placed in piles or cribs, that the filing of the mortgage in the office of the county clerk will not be constructive notice of such mortgage; and third, parties who purchased it after it is husked and placed in the piles or crib without actual notice of such mortgage will take it free from the lien of such mortgage.

"6. You are instructed that if you believe from the evidence in this case that Oscar Dewitt gave the plaintiff a chattel mortgage upon his share of certain corn when growing in the field, and that defendant and Dewitt raised said corn together, and after the giving of said mortgage husked the corn and piled it on the premises occupied by defendant without objection on the part of the plaintiff, and that subsequently defendant, in good faith and without actual notice of the mortgage of the plaintiff, purchased of Oscar Dewitt his share or portion of said corn, then you will find for defendant, even though you also find that plaintiff's mortgage was duly filed in the office of the county clerk of Hall county, Nebraska.

"7. If you believe from the evidence that Oscar Dewitt gave the plaintiff John F. Fines a mortgage upon the corn in controversy while growing in the field, that the same afterwards was husked and placed on the land of defendant, or in his possession, that defendant after the giving of said mortgage by Dewitt to plaintiff purchased the corn of Dewitt, and at the time he purchased it had actual knowledge, or notice, or knew that the plaintiff had a mortgage upon the corn, then your verdict will be for plaintiff, and

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you will assess his damages, which, in this case, will be nominal."

This court in *Gillilan v. Kendall*, 26 Neb., 82, held that a chattel mortgage upon growing corn is not constructive notice to third parties of the mortgage upon the corn after it has been husked and placed in piles or cribs, and that where one, in good faith in open market, purchases such corn from the mortgagor without actual notice of the existence of the mortgage, will take it free from the lien of the mortgage. The case before us, in the facts, is clearly distinguishable from *Gillilan v. Kendall*, *supra*. In the case cited the corn was purchased by Kendall & Smith at their place of business, in good faith and in open market, and they had no knowledge of the existence of the mortgage upon the corn, except such constructive notice as the proper filing of the mortgage gave them. In the case at bar Bolin was not an innocent purchaser for value in the open market. He took the corn in payment of a pre-existing debt. He had helped to gather the corn and place the same in a pile. The filing of the mortgage was constructive notice to him of the lien of the mortgage while the corn was standing in the field, and the defendant having assisted in husking the corn, such filing of the mortgage was sufficient notice to him of the existence of the mortgage upon the same corn after it was harvested and while it was in the pile. The court failed to submit to the jury this view of the case, and the instructions were therefore erroneous.

But it is contended that the judgment should not be reversed for the errors in the charge to the jury for the reason that the verdict is the only one that could have been properly returned under the evidence. Stated differently, that the plaintiff cannot maintain replevin for an undivided interest in the corn. Doubtless, to recover personal property under a writ of replevin, the plaintiff must establish that he is entitled to the immediate possession of

the property, and that the same is wrongfully detained by the defendant. In this case the point is made that as the mortgage was given by Dewitt upon a growing crop of corn owned by the mortgagor and the defendant jointly, and as the uncontradicted testimony shows that there has never been any actual division of the corn, the defendant's possession was not wrongful, and that replevin cannot be resorted to as a means of partitioning property held in common. It is well settled by the authorities that the owner of an undivided interest in a chattel cannot maintain an action against a co-tenant to acquire its possession, for the reason that all joint owners, unless there is an agreement to the contrary, are equally entitled to the possession thereof, and neither has the right to the immediate and exclusive possession of the same as against the others. The doctrine above stated, that one joint tenant cannot sustain replevin against his co-tenant, applies more particularly to a single piece of property, or to things in their nature so far indivisible that the share of one is not susceptible of delivery without the whole. But it should not obtain in a case like this, where the property is absolutely alike in quality and value, and is readily divisible by measurement or weight, such as corn in the crib or pile. When a person is entitled to half of one hundred bushels of corn in a mass, he has a right to fifty bushels in severalty, and if his co-tenant refuse a division, when properly demanded, he may recover his portion of the grain by replevin. (Wells, Replevin, sec. 205; *Sutherland v. Carter*, 52 Mich., 151; *Kaufman v. Schilling*, 58 Mo., 219; *Wattles v. Dubois*, 34 N. W. Rep. [Mich.], 672; *Grimes v. Cannell*, 23 Neb., 187; *Ellingboe v. Brakken*, 36 Minn., 156.)

In the case at bar the defendant declined to give up any portion of the corn, and denied that plaintiff had any interest therein, but repudiated the co-tenancy and claimed to own the property in entirety. By such refusal to recognize the rights of the plaintiff the defendant ought to be pre-

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cluded from now raising the point that there had never been any division of the crop, or that he held possession thereof as tenant in common.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GOTHARDT FISCHER v. J. H. COOLEY.

FILED APRIL 11, 1893. No. 4163.

Justice of the Peace: CONTINUANCE: DISMISSAL. On application of the defendant, the plaintiff consenting thereto, a justice of the peace adjourned a suit pending before him for more than ninety days from the return day of the summons. Afterwards, on the day to which the cause stood adjourned, the defendant objected to the jurisdiction of the justice on the ground that the action had been continued beyond the ninety days limited by the statute, which objection was overruled. *Held*, That the adjournment did not operate as a discontinuance of the action, and that the defendant could not claim a dismissal by reason of the postponement of the trial at his own instance.

ERROR from the district court of Adams county. Tried below before GASLIN, J.

Bowen & Hoepfner, for plaintiff in error.

C. H. Tanner, *contra*.

NORVAL, J.

This suit was brought by J. H. Cooley against Gothardt Fischer, on the 17th day of August, 1888, before J. G. Hayzlett, a justice of the peace, to recover the amount due

upon a promissory note. A summons was issued returnable on the 21st of that month. The parties appeared on the day set for trial, and the defendant applied for and obtained a change of venue, the case being transferred to the docket of C. S. Wilson, a justice of the peace. The defendant then filed a motion for a continuance for thirty days, which was granted, and the time for trial was set for September 27th. On that day he made an affidavit for a second change of venue, and thereupon, by stipulation of the parties, the case was sent to Justice W. B. Burton, and the hearing set for the 20th day of November. On this day, by consent, the trial was postponed to November 30th, and afterwards, on said date, on the written stipulation of the attorneys of the respective parties, the case was again adjourned until February 1, 1889, at 1 o'clock P. M. On that day, by consent of parties, a continuance was had until the 4th day of that month at 2 o'clock P. M., on which day defendant appeared specially and objected to the jurisdiction of the court, on the ground that more than ninety days had elapsed since the return of the summons; which objection was overruled, and defendant making no further appearance, judgment was rendered against him for \$131.90, besides cost. The defendant prosecuted error to the district court, where the judgment of the justice was affirmed, and he now brings the case to this court on error.

The contention of the plaintiff in error is, that the justice had no jurisdiction to try the case; in other words, that the postponement of the trial by successive adjournments beyond ninety days from the time of the return of the summons worked a discontinuance of the cause, and ousted the justice of jurisdiction.

Section 961 of the Code of Civil Procedure, relating to continuances before justice courts, provides, in effect, that an adjournment may be had on the application of either party at the return day, or at any subsequent time to which the cause may stand adjourned, for a period not to exceed

Fischer v. Cooley.

ninety days from the time of the return of the summons, upon the applicant making the showing required by the statute. Under said section, when a justice of the peace adjourns a suit pending before him, without the consent of parties, for more than ninety days from the return day, it operates as a discontinuance. But the rule is otherwise where such continuance is granted by consent or on the agreement of the parties. The party on whose application a cause in a justice court is adjourned beyond the period limited by the statute is estopped to claim a dismissal by reason of such adjournment. (*Jennerson v. Garvin*, 7 Kan., 136.)

While in the case under consideration the trial did not take place before the justice until more than ninety days after the return day of the summons, the record discloses that the cause was continued by successive adjournments until the day upon which judgment was entered, and that each adjournment was obtained, either on the application of the plaintiff in error, or by the consent of both parties. The justice had jurisdiction of the subject-matter, and jurisdiction over the person of the defendant below was not lost by the several continuances, since they were granted upon his procurement or with his consent. He cannot now take advantage of the error or irregularity in the adjournment of the cause. To permit him to do so would be to allow him to reap a benefit from his own acts. The judgment of the district court in affirming the judgment of the justice of the peace is

AFFIRMED.

THE other judges concur.

McKINNEY, HUNDLEY & WALKER V. FIRST NATIONAL BANK OF CHADRON ET AL.

FILED APRIL 11, 1893. NO. 4617.

1. **Sale: FRAUD BY PURCHASER: RESCISSION: REPLEVIN.** Where goods are sold upon credit induced by the fraudulent representations of the vendee as to his solvency, or ability to pay for the goods bought, the vendor may rescind the sale upon the discovery of the fraud and replevin the goods.
2. ———: ———: ———: ———: **PLEADING.** *Held,* That the petition in the case states a good cause of action in replevin.

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

Ledwich & Crow, Bartlett, Crans & Baldrige, and Spargur & Fisher, for plaintiffs in error.

Albert W. Crites, contra.

NORVAL, J.

This was an action brought by plaintiffs in error to recover the possession of certain goods, wares, and merchandise. The plaintiffs in their amended petition allege:

"First—That the plaintiffs are the owners and are entitled to the immediate possession of the following goods and chattels, to-wit: * * *

"Second—That defendant First National Bank of Chadron, Nebraska, is a banking association duly organized and incorporated under the laws of the United States, and doing business at Chadron, Nebraska. That the defendant the First National Bank of Chadron, Nebraska, wrongfully detains said goods and chattels from the possession of these plaintiffs, and has so wrongfully detained the same for the space of more than five days last past, to plaintiffs' damage in the sum of \$50.

36	629
42	238
36	629
45	430
45	445
36	629
47	150
36	629
54	793

McKinney v. First Natl. Bank of Chadron.

"Third—That on or about the 11th day of March, 1889, the plaintiffs sold and delivered to the defendant Charles F. Yates, pursuant to the order of said Yates, the goods above described, and that said goods were received by the defendant Yates; that at the time said goods were so ordered and received by the defendant Yates the said Charles F. Yates, as a firm and as an individual, was, and had for a long time prior thereto been, insolvent to his, Yates' own knowledge, and the said Yates ordered and received said goods while knowing his insolvency and his inability to pay for the same; that he ordered and received said goods with the intent not to pay therefor, and to cheat and defraud the plaintiffs of the purchase price thereof.

"Fourth—That the said Charles F. Yates concealed from the plaintiffs his insolvency and his inability to pay for said goods, and his intention not to pay for the same, and his intention to cheat and defraud the plaintiffs of the purchase price thereof; and the plaintiffs, relying on the solvency and good faith of said Charles F. Yates, and not knowing his fraudulent intention or of his insolvency, sold said goods and shipped the same as hereinbefore stated.

"Fifth—That on the bringing of this suit the plaintiffs elected to rescind said contract of sale without notice thereof and to bring this suit; that they so elected to rescind the same as soon as they were informed of the fraudulent intention and conduct on the part of said Yates; that by reason of such fraudulent conduct and intent, and said election to rescind said sale, the plaintiffs are the absolute and unqualified owners of said goods and merchandise."

The defendant bank answered by a general denial, and the other defendants, Charles F. Yates and Albert Yates, made no appearance in the case.

A trial was had to a jury, who, under the instructions of the court, returned a verdict in favor of the bank, assessing the damages at \$765.50, and judgment was entered upon the verdict.

At the commencement of the trial, and before any testimony was received, the defendant bank objected to the introduction of any evidence in the case for the reason that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the bank, which objection was sustained by the court, and the plaintiffs took an exception. Thereupon counsel for plaintiffs offered certain depositions in evidence for the purpose of proving the allegations of the petition, to which offered testimony the bank objected on the ground that the petition fails to state a cause of action. The objection was sustained and the plaintiffs were not permitted to introduce any testimony and an exception was taken to the said ruling of the court.

But a single question is presented by the record for the consideration of this court, which is, Does the amended petition copied above state a cause of action against the bank? We are all agreed that the petition sets forth sufficient facts. The gist of the action is the unlawful detention of the property sought to be recovered. The petition specifically avers that the plaintiffs are the owners of the goods and entitled to their immediate possession, and that the defendant bank wrongfully detains the possession of the same from the plaintiffs. The value of the property is also stated. No other averments were necessary to constitute a good petition in replevin. (*Haggard v. Wallen*, 6 Neb., 271; *Daniels v. Cole*, 21 Id., 156.)

The petition also sets up the facts relating to plaintiffs' ownership and their right to possession of the property in dispute. It appears from the allegations that the plaintiffs were induced to sell the goods to Yates upon credit by the fraudulent representations of the latter as to his solvency; that Yates purchased them with the intention to defraud the plaintiffs out of the purchase price; that the plaintiffs delivered the goods in good faith in the belief of the purchaser's solvency, and as soon as they learned of his

 Barton v. McKay.

financial condition they elected to rescind the contract of sale, and brought their action to recover back the goods. We are of the opinion that the petition charges such fraud as to authorize the vendors to rescind the sale. (*Tootle v. First National Bank of Chadron*, 34 Neb., 863.)

It is said in the brief of the defendant that the petition does not contain a single allegation of fact against the bank. While there is no averment in the petition as to how the bank obtained possession of the goods, the general allegations to the effect that plaintiffs were the owners of and entitled to the immediate possession of the property constituting the subject of the action, and that the same was wrongfully detained by the bank, sufficiently negatives its right to retain the goods. If the bank is a good faith purchaser or mortgagee without notice of the fraudulent purpose of Yates, that is a matter of defense to be established by proof upon the trial. A petition substantially like the one in the case at bar was upheld in *Tootle v. First National Bank*, *supra*.

For the error of the district court in refusing to permit the plaintiffs to introduce evidence to sustain the allegations of the petition the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN BARTON V. ALEXANDER S. MCKAY.

FILED APRIL 11, 1893. No. 4923.

1. **Continuance: AFFIDAVITS: REVIEW.** Affidavits used in support of a motion for a continuance in the district court, to be available in the appellate court, must be made a part of the record by a bill of exceptions.

36	632
41	342
36	632
44	9
36	632
48	143
36	632
55	472
36	632
56	198
36	632
60	548
36	632
61	52

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2. ———: MOTION: COUNTER-AFFIDAVITS. Permitting counter-affidavits to be used on the hearing of such a motion is improper.
3. ———: ———: ———: HARMLESS ERROR. Where such affidavits are used, and the application for a continuance is denied, the judgment will not be reversed for that reason, where the showing of the party making the application, when considered alone, is insufficient to entitle him to a continuance.
4. CONVERSION: THE EVIDENCE in this case examined and considered, and *held* to support the judgment of the court below, and that the verdict is not excessive.
5. Admissibility of Evidence. The *ex parte* affidavit of W. S. L. was properly excluded from the jury on the trial of the cause, as it was inadmissible under the rules of evidence.
6. Rulings on Admissibility of Evidence: REVIEW. The rulings of the trial court, in not permitting the defendant to answer certain questions propounded to him by his counsel on direct examination, cannot be reviewed by this court, for the reason no offer was made in the trial court to prove the facts which the party complaining assumes the questions would have elicited.
7. INSTRUCTIONS: REVIEW. The supreme court will not review the instructions given to the jury by the court below, nor those asked and refused, where the attention of the court has not been called to them in the motion for a new trial.
8. ———: ———. The instructions to the jury in this case, when considered and construed together, fairly state the law applicable to the issues raised by the pleadings and proofs.
9. ———: ———. The defendant's third request to charge was properly refused, inasmuch as it was covered by other instructions which were given.

ERROR from the district court of Saline county. Tried below before MORRIS, J.

F. I. Foss, for plaintiff in error.

Hastings & McGintie and *A. S. Tibbets*, *contra*.

NORVAL, J.

This action was brought in the court below by Alexander S. McKay against John Barton, as sheriff, for the con-

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version of a stock of goods seized on two writs of attachment against Lusk Brothers & Co. From a judgment on a verdict in favor of plaintiff for the sum of \$2,331.10, defendant brings the cause to this court for review by petition in error.

The first ground upon which a reversal is asked is the overruling of defendant's motion for a continuance of the action on account of an absent witness. The record fails to disclose that there was any abuse of discretion in denying the application. That every presumption is in favor of the correctness of the decision of a trial court, until the contrary is made affirmatively to appear, is elementary. Error is never presumed. Tested by this rule, the decision under consideration must be upheld. The record fails to inform us upon what facts the trial court predicated its decision. It is true the journal entry recites that the motion for a continuance was heard upon affidavits, and the transcript contains a copy of an affidavit made by Mr. Foss, defendant's attorney, as well as copies of other affidavits, which latter, judging from their contents, were made in resistance of the motion, yet there is absolutely nothing to show that any of the affidavits were read or considered on the hearing of the application; hence, they cannot be considered by this court. Our decisions to the effect that affidavits used in the district court at the hearing of a motion, to be available in this court, must be preserved in the bill of exceptions, ought not to be misunderstood, inasmuch as we have so frequently passed upon the question. (*Walker v. Lutz*, 14 Neb., 274; *Tessier v. Crowley*, 16 Id., 372; *Graves v. Scoville*, 17 Id., 593; *Olds Wagon Co. v. Benedict*, 25 Id., 372; *Barlass v. Braash*, 27 Id., 212; *Burke v. Pepper*, 29 Id., 320; *Strunk v. State*, 31 Id., 119; *Van Etten v. Kisters*, Id., 285.)

Even though the affidavit of Mr. Foss should be considered by us, we think the court was justified in refusing to continue the case. Three continuances already had been

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granted, one at the March, 1889, term, by consent, and at the October term of the same year and the March term, 1890, continuances were granted on motion of the defendant, for the purpose of obtaining the testimony of one William S. Lusk, who was absent from the state. The last application was based upon the absence of the same witness, and the affidavit fails to show that either the personal attendance of Mr. Lusk or his evidence would probably be obtained if the trial had been postponed or the cause continued until the next term of the district court. For that reason the affidavit was insufficient to justify a continuance. (*Polin v. State*, 14 Neb., 540; *Singer Mfg. Co. v. McAllister*, 22 Id., 359; *Rowland v. Shephard*, 27 Id., 494.)

Complaint is made because plaintiff was permitted to file affidavits in resistance of the motion for a continuance. It is not the proper practice to allow counter-affidavits to be read at the hearing of such a motion. (*Gandy v. State*, 27 Neb., 707; *Miller v. State*, 29 Id., 437.) But we are unable to see in what manner the defendant in this case was prejudiced by the use of counter-affidavits, since, upon his own showing, if the said affidavit in support of the motion be considered, he was not entitled to have the trial postponed. For another reason we cannot say that error, prejudicial to the defendant, was committed by the receiving of counter-affidavits, as we have no means of knowing what they contained, they not having been made a part of the record by a bill of exceptions.

It is insisted that the verdict is not supported by the evidence. It appears that the goods in controversy formerly belonged to the firm of Lusk Brothers & Co., of Friend, which firm was composed of Abner P. Lusk, William S. Lusk, and Joseph Boynton. On the 11th day of January, 1888, the partnership, by mutual agreement, was dissolved, and, by written contract signed by each partner, the partnership property was divided between them. Abner P. took the

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real estate and assumed the incumbrances thereon, amounting to about \$2,400; William S., for his share, received the goods in suit, of the value of \$2,767.12, also certain notes and book accounts, and agreed to pay the firm indebtedness not secured by the real estate, aggregating over \$2,100, and Boynton received notes and accounts of the value of some \$700. The agreement for dissolution was duly recorded, and the property of the firm was divided according to the terms thereof. On the 14th day of January, 1888, William S. Lusk executed and delivered to the defendant in error, Alexander McKay, his promissory note for the sum of \$2,000, and secured the payment thereof by giving a bill of sale on the stock of goods in dispute. McKay took possession under his bill of sale. Subsequently, on the 17th day of January, 1888, two creditors of the firm of Lusk Brothers & Co. sued out writs of attachment against the firm, and placed the same in the hands of plaintiff in error, who levied upon said stock of goods and sold the same under the writs. At the time of the levy, McKay was in possession of the stock.

Plaintiff in error insists that the goods were the property of Lusk Brothers & Co.; that the note and bill of sale were without consideration, and that they were given for the purpose of defrauding the creditors of said firm. So far as the question of ownership is concerned, the facts bearing thereon are substantially as given above, with the exception of what we are now about to state. At the trial Abner P. Lusk testified, on behalf of the defendant below, that the possession of the goods was never delivered to William S. Lusk, but that they were turned over to McKay with the distinct understanding that he should sell a sufficient amount to pay the unsecured debts of the firm, after which the goods remaining unsold were to be delivered to said William S. Lusk. This testimony is flatly contradicted by both McKay and Joseph Boynton. They deny that there was ever any such arrangement, or that it

was ever talked of or mentioned in their presence. It appears that the partnership was dissolved on account of differences which arose between the Lusk brothers. Prior to the dissolution, the firm was not being pressed by their creditors, but as soon as the partnership was dissolved the creditors took steps to collect their claims. We are convinced from a reading of the evidence that the possession of the stock was delivered to William S. Lusk, under and according to the terms of the contract of dissolution. It is uncontradicted that at the time the firm went out of business, it was indebted to McKay for money loaned, in the sum of \$130. William S. Lusk, on the 12th of January, 1888, went to McKay, who is a grain dealer in the town of Friend, and informed him that he had been having trouble with his brother and that the firm had been dissolved; that his brother Abner was going to inform the creditors of the condition of affairs, and proposed, if McKay would make him a loan of \$2,000, he would pay the creditors of the firm. McKay thereupon agreed to let him have \$1,870, which sum, together with said indebtedness of \$130, was to be secured by a bill of sale upon the stock of goods. McKay drew his check on the Merchants and Farmers bank of Friend for the sum of \$1,870, payable to the order of W. S. Lusk, and gave the same to one H. J. Huffman, to be by him delivered to said Lusk on the execution of the note and bill of sale. The papers were executed on January 14, 1888, and the check was delivered by Huffman to William S. Lusk two days later.

H. J. Huffman testified that the payee of the check indorsed it to him, and requested him to draw the money thereon, as Lusk was sick and unable to go to the bank; that the witness indorsed the check, received the money from the bank, and immediately went to Mr. Lusk's house and gave it to him.

Frank Unckless, the assistant cashier of the bank, swears that Huffman presented the check at the bank and he paid

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him the sum therein named on January 16. The check was produced on the trial and put in evidence, which contains the indorsements of both Lusk and Huffman, and bears the bank stamp of payment. There is not a syllable of testimony contradicting the payment of the money to William S. Lusk. True, the latter never paid the creditors of the firm, but subsequently absconded. But there is an entire failure of proof to show that McKay had any knowledge that there was any intention on the part of Lusk to defraud the creditors. On the contrary, it shows that McKay acted in the utmost good faith in the entire transaction. No suspicion of fraud can be imputed to him. He took possession under his bill of sale, and began selling, as had been agreed upon, and continued so to do until he was stopped by the attachments. He received from the sale of goods \$112.08, and this is the only payment that has ever been made upon his claim of \$2,000. From the testimony before us, there is no escaping the conclusion that plaintiff below had a valid lien upon the goods for the balance due him.

There is no foundation for the charge that the verdict is excessive. The sum assessed by the jury was considerably less than the amount of the \$2,000 note with ten per cent interest thereon until the first day of the term, at which the cause was tried, after deducting the credit of \$112.08. McKay was entitled to a judgment for the full amount of his lien, inasmuch as the same was less than the stipulated value of the property at the time the levies were made.

It is urged that the court erred in excluding from the jury the affidavit of William S. Lusk. Plaintiff in error procured from said Lusk, after he had absconded, and while he was in Colorado, an *ex parte* affidavit relating to the giving of the bill of sale and the payment of the money by McKay. The affidavit was inadmissible under the rules of evidence, and the court did not err in refusing to permit it to be read to the jury. Elaboration on this point is unnecessary.

Complaint is made because the court sustained objections to numerous questions propounded to plaintiff in error by his counsel on direct examination. None of these rulings can be reviewed, for the reason no offer of proof was made in the court below. It has been decided in a vast number of cases in this state that the refusal to permit a witness to answer questions propounded to him on his examination in chief cannot be considered by a reviewing court, unless the party calling the witness makes an offer to prove the facts which he assumes that his question will elicit. It is necessary for the party complaining to state and have the reporter take down what he proposes to prove by the witness, in order that the reviewing court may determine whether the testimony is competent and material. (*Roach v. Hawkinson*, 34 Neb., 658, and cases there cited.) During the entire trial but a single tender of proof was made, and that was upon a matter not discussed in the brief of counsel for plaintiff in error; hence it will not be considered.

Objection is made in the brief of counsel to the giving and refusing of certain instructions. The fourth and eighth paragraphs of the court's charge read as follows:

"4. If you shall find from the evidence that Lusk Bros. & Co. were in business in the town of Friend, and that they dissolved partnership, and that the stock of merchandise belonging to such firm was set over to William S. Lusk, subject to his payment of the debts of such firm of Lusk Bros. & Co., and possession of such stock of goods was under such dissolution agreement given to William S. Lusk, and that thereafter William S. Lusk procured a loan of the plaintiff and turned over to him to secure the payment of such loan the stock of goods in question, and that the plaintiff was in actual possession of such stock of goods, holding the same to secure the repayment of the loan made to William S. Lusk, then the plaintiff would be entitled to recover from the defendant the balance of said loan remaining unpaid, with interest thereon, as you shall find

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the same from the evidence, unless you shall find from a preponderance of the evidence that the plaintiff had entered into a fraudulent conspiracy with William S. Lusk with intent to defraud the creditors of Lusk Bros. & Co., or that William S. Lusk borrowed the money of plaintiff and gave his note for the same and the bill of sale of the stock of goods to secure the payment of such notes and interest, to cheat, defraud, hinder, or delay his creditors, and that plaintiff McKay knew of such intent on the part of William S. Lusk.

"8. There is nothing unlawful nor improper for one person to advance or loan to another money, simply because the other is in financial difficulty. Ordinarily, that is the only time that one wants financial assistance; neither is it unlawful to require and receive security therefor. What the law condemns, and under which it affords no protection to a person loaning money or purchasing property, is that the loan or purchase be coupled with the intent to defraud, hinder, and delay the creditors of the party obtaining such loan or making such sale; hence, if you shall find the allegations of the petition to be sustained, as required by these instructions, the plaintiff would be entitled to recover, unless the allegations of the defendant's answer are by you found from the evidence to be sustained by a preponderance of the evidence. If you shall find from the evidence, by a preponderance thereof, that plaintiff had possession of the goods in question as trustee for the benefit of creditors, then the defendant would be entitled to a verdict, except as to any surplus that such goods have been shown by the evidence to have been worth over and above the amount of the attachments held by defendant, and under which he justifies the taking of the goods. And that brings our examination to the other defense, alleging a conspiracy of plaintiff and others to defraud the creditors of Lusk Bros. & Co., and upon this point I read you the instructions asked by the respective parties to this action."

It is believed that the foregoing instructions enunciate correct legal principles and that they were applicable to the issues raised in the case by the pleadings and evidence, especially when construed in connection with other paragraphs of the court's charge to the jury. The rule is that where the instructions, when considered as a whole, fairly state the law, it is sufficient. The objection urged against the fourth instruction is that it omitted to state that if McKay, when he made the loan and took the mortgage, had notice of such facts as would have put a person of ordinary prudence upon inquiry, which, if pursued, would have led to a knowledge of the fraudulent motive of the mortgagor, he would not be protected. A sufficient answer to this contention is that counsel for Barton requested no instruction covering that point. If he was not satisfied with the instruction given, on the ground above stated, he should have presented an instruction covering that question. (*Post v. Garrow*, 18 Neb., 688; *Woodruff v. White*, 25 Id., 753.)

The court gave two instructions numbered 8, while the giving of but one of that number is assigned as error in either the motion for a new trial or the petition in error, and they do not point out or specify the one relied upon. Exception was taken to but one paragraph numbered 8, when the charge was read to the jury, which is the one quoted above. We do not think it subject to just criticism.

It is argued in the brief of plaintiff in error that it was error to give plaintiff's request number 2, which is as follows:

"2. The jury are instructed that fraud is not to be presumed, but must be proved the same as any material fact; and unless the jury are convinced by the evidence deduced in this case, that the possession of McKay was fraudulent, and that said fraud was known and participated in by McKay, then, as to the defense of fraud, you should find for the plaintiff."

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While this instruction was duly excepted to by the defendant, neither the giving of it nor the 9th instruction can be considered, for the reason they were not assigned for error in the motion for a new trial filed in the court below. (*Schreckengast v. Ealy*, 16 Neb., 510; *Omaha & R. V. R. Co. v. Walker*, 17 Id., 432; *Nyce v. Shaffer*, 20 Id., 507.)

There was no error in refusing to give to the jury the defendant's third request, since the substance of it was incorporated in other instructions requested by him, which were given.

The refusal to charge as requested by the defendant's fourth instruction will not be considered, inasmuch as no objection was made thereto in the motion for a new trial. (*Omaha & R. V. R. Co. v. Walker*, *supra*.)

A careful examination of the record shows a fair and impartial trial. We fail to discover any prejudicial error in the proceedings and the judgment will be

AFFIRMED.

THE other judges concur.

**CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
V. MINNIE LANDAUER.**

FILED APRIL 11, 1893. No. 4885.

1. **A new trial** should be allowed when it is clear that material uncontradicted evidence has been disregarded by the jury, and which, if considered and given due weight, would have required a different verdict from that returned.
2. **Negligence: QUESTION FOR JURY.** It is the settled rule in this state that where different minds may draw different inferences from the same state of facts, as to whether such facts es-

36	642
39	70
39	614
39	806
36	642
40	616
36	642
44	460
44	800
36	642
45	577
36	642
48	99
48	168
48	460
48	406
48	641
36	642
53	461
54	267

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tablish negligence, it is a proper question for the jury and not for the court. But that rule is subject to the qualification that the inference of negligence must be a *reasonable* one. Where it is impossible to infer negligence from the established facts without reasoning irrationally and contrary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant. MAXWELL, CH. J., dissenting.

3. **Carriers.** It is the duty of railroad companies to stop their trains at stations a sufficient length of time for passengers to get on and off, and it is negligence for the conductor or other servant of the company to start a train while passengers are obviously in the act of getting on or alighting therefrom.
4. ———: **NEGLIGENCE.** But when a train has made a reasonable stop and passengers have not given notice or other evidence of their intention to alight, the starting of the train is not *per se* negligence for which the company will be held liable.
5. ———: **CRIMINAL NEGLIGENCE.** The term criminal negligence, as used in sec. 3, art. 1, ch. 72, Comp. Stats., means gross negligence, such as amounts to reckless disregard of one's own safety and a willful indifference to the consequences liable to follow.
6. ———: **PASSENGER ALIGHTING FROM MOVING TRAIN: PERSONAL INJURIES: CONTRIBUTORY NEGLIGENCE.** It is not such contributory negligence for a passenger to jump from a moving train as will in every case prevent a recovery under the statute above cited; but where the circumstances are such as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, such act amounts to criminal negligence as above defined. MAXWELL, CH. J., dissenting.
7. ———: ———: ———: ———: **EVIDENCE.** In an action to recover for personal injuries sustained by the plaintiff in jumping from a moving train, the undisputed evidence is that after the train stopped at C. station, for which she held a ticket, the conductor called out the name of the station, but did not leave the train, being engaged in collecting tickets; but by his order the brakeman got off at the rear of the train and walked along the station platform to the rear of the next to the last car, where, after assisting some passengers to alight, and seeing no others to get off, he gave the signal "all aboard." After the train had started, and was well under way, plaintiff, who had occupied the fourth seat from the front of the rear car, came out upon the front platform thereof, and after hurriedly stepping down one

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step, and without warning to the conductor or brakeman, who both supposed the passengers for that station had all left the train, and without looking to see where she would land, jumped at a right angle from the train, and in falling was severely injured. Another passenger who had alighted on the opposite side had walked the length of a car, crossed over on the car platform and walked fifty feet to the gate of a park that distance from the station, while other passengers had walked to a point some distance inside the park fence before the train pulled out. It also appears that plaintiff was a young woman, seventeen years of age, of average intelligence, and well acquainted with the premises. *Held*, Not to sustain the negligence charged, viz., the negligent starting of the train without giving plaintiff sufficient or reasonable time to alight. *Held, further*, That plaintiff was guilty of such contributory negligence as will prevent a recovery for the injuries received in jumping from the train. MAXWELL, CH. J., dissenting,

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

T. M. Marquett and J. W. Deweese, for plaintiff in error.

Leese & Stewart, contra.

POST, J.

This is a petition in error by the Chicago, Burlington & Quincy Railroad Company, and brings into this court for review a judgment recovered by the defendant in error for personal injuries alleged to have been received by her in alighting from a train of the plaintiff in error at Cushman Park near Lincoln. It appears from the petition that the plaintiff below, Minnie Landauer, (now Minnie Parr), on the 5th day of July, 1889, purchased from the defendant below a first class ticket from Lincoln to Cushman park, and that upon the arrival of the train upon which she was a passenger at the last named station "she started to alight from said train, and while so attempting to alight the defendant, negligently and carelessly and without giving plaintiff sufficient or reasonable time in which to alight,

started its said train whereby plaintiff was thrown violently to the ground without any fault or negligence on her part," by reason of which she received severe personal injuries, etc. The only allegation of negligence is that included within the above quotation from the petition. In its answer the defendant below denies all allegations of negligence on the part of its servants and alleges that whatever injuries were received by the plaintiff therein were in consequence of her own negligent and careless act in jumping from the train while in motion. Cushman park is a flag station on the defendant's line of road three miles west of Lincoln, where trains are accustomed to stop during the summer months, principally for the convenience of persons from the city visiting the park. The platform where passengers enter and alight from the cars is 215 feet in length and 7 feet wide, its elevation being a few inches above that of the rails of the track. The plaintiff below was at the time of the injury a young woman seventeen years of age, evidently possessed of the average intelligence and who was acquainted with the premises, having frequently visited the park, going and returning on the defendant's trains. On the day in question there were an unusual number of passengers from Lincoln. The conductor, who was passing from the front to the rear of the train collecting tickets, had just passed the plaintiff, who was sitting three or four seats from the front door of the last or ladies' car when the train reached the station. He called out the name of the station, but kept on collecting tickets, having given orders for the brakeman to stop and start the train while he was thus engaged. It is clearly shown, and not disputed, that the brakeman got off at the rear end of the train and walked along the station platform to the rear of the smoking car which was the next in front of the ladies' car, where he signaled the engineer to start the train. He then entered the smoker from the rear, closing the door after him, at which time the train was in motion. It is evident

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that the train had started before the plaintiff attempted to alight, as she testifies on her direct examination that before she left the car she saw the brakeman through the glass door in front of her. Her testimony, so far as it relates to the cause of the injury, is as follows:

When I supposed the train had stopped I walked out to the front. I was in the last coach and I walked to the front of the coach and looked behind me and seen the conductor talking to some one, and the aisle seemed to be filled with men as I looked back behind me. I think it was about the fourth seat from the front, and when I looked behind me I seen he was standing there, so I just went right out.

Q. Which way did you go out?

A. The front of the coach.

Q. How far did you sit from the front door?

A. About three or four seats back. I can't remember which, I think it was four. I went out, and just as I was going, before I opened the door, I looked through the door, and I could see, through the glass door, the brakeman—I could tell it was the brakeman by his cap, and just as I got out I looked down and I seen the platform just as I got out of the door. I don't remember looking toward the platform any more; I remember looking down to my feet where I was to step. I stepped one step, and as I stepped the other step—the wind was blowing real hard—and I raised my foot, and as I stepped, I did not step on the platform, and it threw me to the ground. I laid there until some one came and picked me up. I don't remember seeing the platform after I took the second glance out; I seen the step when I stepped, and then I stepped right off in the air.

Q. When did you first discover that the train was moving; that is, if it was moving?

A. I did not know that the train was moving; I did not realize that the train was moving at all; I supposed it had stopped.

Q. Had it stopped prior to this time?

A. They say that it had, but I could not state that it had. I have no knowledge of the train stopping whatever. So I was picked up and the train went on, and I remember the train backing back, and I remember the conductor saying, after they had carried me to the stile, he said: "If I had known you was on the train and wanted to get off I would have been glad to have helped you off." He seemed to be very sorry that I was hurt.

Q. Did the conductor get out of the car when the train stopped; I don't mean when they backed up?

A. No, sir; he was standing right there talking to the men.

Q. Did you not see either the conductor or the brakeman on the platform?

A. No, sir; I expected one or the other to help me off; it was quite a step, but I remember him saying, "if he had known it he would have been glad to help me off." There was a physician on the train that said my ankle was broken.

* * * * *

Q. About how many feet west of the platform was it that you fell?

A. I could not just exactly say, but I think it must have been between seven and eight feet, something like that.

Q. Mrs. Parr, as soon as you thought the train had stopped there at Cushman park, what did you do? Did you sit in your seat or did you get up and start to get off?

A. I started to get off when I thought the train was stopped.

Q. You have been there before?

A. Yes, sir.

Q. On that train to that station before?

A. Yes, sir.

Q. What was your age at that time?

A. I was seventeen years old.

And on cross-examination she testifies:

Q. Did the train stop at Cushman park? Can you say that it did?

A. I have no knowledge or anything.

Q. Did you not know at the time whether it was stopped or not?

A. No, I thought it was stopped, I naturally supposed it would stop.

Q. Can't you tell well enough whether a train is running or standing still?

A. The wind was blowing real hard, and from what some of the rest say it was pulling out real slow, as it always does when a train starts; I suppose it was just pulling out. I think it was stopped when I stepped because I could see the platform when I first looked out, but after that I don't remember seeing the platform. I expected, of course, to step on the platform, but I stepped right in the air.

Q. Did you see the platform when you looked out through the window?

A. When I went out on the step outside of the door.

Q. So you suppose the train was moving out slowly as they do when they start?

A. I say I thought it was stopped, but that is the way others say it was; I thought it was stopped.

Q. Did you stop when you went out on the platform or look to see what the train was doing or undertake to get off?

A. No, I just took a glance out and then just took a step. I just turned my head as I closed the door. I was looking to see if any one was there to help me off, that was my reason for looking.

Q. Did you see the brakeman in the car in front of you?

A. Yes, right in front of me; I seen him there through the doors; he was looking this way, or had his face turned sideways.

Q. Did you take hold of the railing to the car platform, or anything?

A. Yes, sir; you mean—I don't understand the question.

Q. You know on a car platform there is an iron railing on the outside and on the inside. Did you take hold of that?

A. Yes, sir; I took hold of the one on the inside.

Q. What did you have in your hands?

A. A parasol, that is all.

Q. Did you let go of that railing?

A. Yes, sir; I can't say, of course, I suppose, as I stepped—yes, I let go of the railing just as I stepped.

Q. Did you get down more than one step?

A. I stepped one step; you know there is only two steps, isn't there, that is one step and then a step to the ground?

Q. How many steps down did you go from the top?

A. I don't remember that.

Q. You took hold of the railing with the left hand and got off on the left-hand side of the train; that is you took hold of the railing next to the car?

A. Yes, sir; there was a kind of brass piece there.

Q. The train was headed west and you got off on the left-hand side of the train toward Cushman park?

A. Yes, the side that faces the gate; I don't remember about the direction. I am always turned around about directions.

Q. What I mean to say is—of course, we know when a train is going out of Lincoln that way is going west?

A. Yes, sir.

Q. And you got off on the left-hand side?

A. Yes, sir.

Q. When you first got out there to the station did you say you went back to the rear end of the coach?

A. No, I raised up and looked back to the rear end of the coach, as I showed you a while ago. I first looked out; then I looked up and seen the conductor standing there.

Q. He was back at the rear end taking up tickets?

A. He was right in the center or near the center of the

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coach talking to some men, and I think the aisle was full and crowded with men. I think some of them were sitting with their feet in the aisle, sitting on the arms of the seats with their feet in the aisle. He was standing there.

Q. Is it not a fact now that you went back to get off that way; you went back to where the conductor was and saw that the aisle was crowded and then turned and went to the front?

A. No, sir.

Q. Did you not so tell the conductor after you was hurt?

A. No, sir.

Q. And the other people that were there?

A. No, sir.

Q. Did you not say that when you came out after it was over?

A. No, sir.

Q. What did you mean by saying you had no knowledge of the stopping of the car?

A. I said I supposed the train was stopped when I stepped off, and that I did not know it was moving; if it was moving I did not know it.

Q. You did not wait long enough to see whether it was going or standing still?

A. No, sir; I supposed it had stopped because I had only got to the outside, and I thought it would stop long enough to let me off, but I don't know that I thought anything about it, only I think now that I supposed at the time that it was stopped, and I stepped off in the air.

The only other witness who testified for the plaintiff with respect to the injury was Wm. Kendall, who was, according to his testimony, 600 or 700 feet south of the train at the time of the accident. On his direct examination he says:

Q. Was you looking at the train when it came in?

A. I was looking at the train just before it stopped, you might say.

Q. Did you see it stop? Did you see it when it was standing?

A. Yes, I did.

Q. Can you say about how long it stopped?

A. I don't think the train stopped to exceed forty seconds.

Q. You mean then just coming to a stop and starting right out?

A. Yes.

Q. Did you see anything of Mrs. Parr, then Minnie Landauer? Whereabouts was she when you saw her?

A. I did not see her until she was in the air, you might say.

Q. Describe how she appeared; whether she appeared to be jumping, or falling or how?

A. She appeared to be falling then.

Q. How far west of the platform did she fall, if you remember?

A. That I do not remember; it has been quite a while ago, and I have not been out there only two or three times since, and I never looked to see.

On his cross-examination he testified:

Q. You were looking at the train?

A. I was looking at it before it came in; that is, when it got within maybe fifty or sixty yards of the station.

Q. What made you take notice of the time it stood there?

A. Sir?

Q. Did it stop at all?

A. I did not take notice, you might say, but that is my idea; that it did not stop over forty seconds.

Q. The first you saw of her she was in the air?

A. When I seen her she was in the air.

Q. You did not see her at the time she leaped, or at the time she left the train?

A. When I seen her she was in the air. You know

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yourself that all that distance away I could not tell—a lady having a dress on—whether her foot was on the step or not. I could not tell, nor you neither.

Q. You saw her in the air?

A. Yes, sir.

Q. She was out away from the car?

A. How far away I could not tell at that distance. She was in the air.

Q. And the train was doing what?

A. Now I could not say whether it was moving or standing still, or what you would call it.

Q. Still you say the train was not running at the time she got off.

A. I don't know what you would call it, whether you would call it stopped or running.

On the part of the defendant below, Lyman, the conductor, testified that being engaged at the time in collecting tickets and fares, he ordered the brakeman to start and stop the train at Cushman park; that he, witness, called out the station after the train stopped; that he also noticed just as the train started again some of the passengers who had left the cars over in the park some distance away; that very soon thereafter, having finished collecting tickets, he started forward and was met by the brakeman, who informed him that a woman had jumped from the train. Referring to the length of the stop he testifies:

Q. About how long did you stop at that station?

A. Not less than three minutes. It might have been more, but not less than that.

Q. Was the stop longer than usual?

A. Yes, sir; it was longer than usual.

Q. Why?

A. On account of the train being crowded and I not being able to get out and see the passengers get off myself, but I had my brakeman do it and he did not know when they were all off exactly, and he thought he had given

them ample time, and didn't see any more coming and he started the train.

Beck, the brakeman, testifies that he got off at the rear of the train and walked leisurely along the station platform to the rear end of the smoker and helped two men to alight who appeared to need assistance. As to what transpired immediately thereafter he testified as follows:

Immediately before I got on I gave the signal "all right, go ahead." I walked into the smoker—at that time the rear car door was closed and I saw nobody trying to get out, so I walked right into the smoker and I judge I had got three or four steps, probably ten or twelve feet, in the car, when somebody asked me a question and I turned sideways this way, to answer the question; as I did so I saw a black object—the lady had on a black dress—something came to me that something was wrong, and I made a rush to the door, and as I did, I just about got to the door as she went in the air. She jumped; I did not see her take a step down at all; she may have taken a step, but apparently she left the top of the platform and jumped right out in the air sideways. I looked out, I hung right out to see if she was hurt, and she fell and lay there. I made a rush right into the car and notified the conductor that there was a lady jumped from the train. He pulled the cord and stopped, and we backed up.

Q. Did you see her when she lit on the ground?

A. Yes, sir.

Q. How did she alight?

A. The train was headed in this way, and of course she jumped from the platform in this way. (Indicating at right angle to the direction of the train.) She struck right on her two feet and rolled right over about once and laid there.

Q. She fell right over?

A. Yes, sir.

Q. Did she take hold of anything?

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A. Not that I know of—I don't believe she did.

Q. First was the black object and a rush to the door, and then you saw her jump from the platform?

A. Yes, sir.

Q. About how fast was the train going at that time?

A. I should judge we had gone about two car lengths, and the train would get under pretty good headway in that distance; it would be pretty hard for me to state the rate of speed we were running.

Q. Have you been railroading a good while?

A. It has been the heft of my life for eighteen years.

Q. What would you say as to the danger of a person jumping off in that way with that rate of speed?

A. I don't think it would be safe for me to jump off that way.

Foster Seacrest, a passenger, testified that he alighted on the north or right-hand side of the train and walked the length of the smoking car when he crossed to the south side of the train upon the forward platform of the smoker or the rear platform of the baggage car. He then walked over to the park steps where he stood engaged in conversation for two minutes or more before the train pulled out. He did not see the plaintiff jump and could not tell how far the train had gone when he saw her on the ground. He also testified that other passengers from the train were quite a distance inside of the park when the train started.

Mrs. Smith, who was occupying the last seat at the rear of the car, noticed the plaintiff, after the train stopped, leave her seat and go to the rear of the car where some men were standing, when she turned and walked forward and that the train started just as she got to the door.

J. C. F. McKesson, a passenger, was standing at the rear end of the car and testified as follows:

Q. What did you see Miss Landauer do?

A. I saw her coming through the train towards me, that is, towards the rear end of the car. She seemed to be some-

what bewildered and then turned around and went back the other way to the west door.

Q. How long did the train stop there?

A. I don't know. The usual length of time, I presume a minute or a minute and a half.

Q. What was the train doing with reference to being still or moving at the time she left the rear end of the coach to go to the front?

A. The train was in motion.

Q. What was its speed by the time she got out on the front platform?

A. I could hardly say—you mean per hour? It had started up from the station. I don't know just what rate it ran.

Q. How was it going with reference to a person safely jumping off or stepping off?

A. I should think it was running almost too fast for a woman to get off.

Q. Was there anybody in the front aisle to interfere with her going through that way in the first place?

A. I think not; although there might have been a person or two standing there. The car was crowded.

Q. Do you know about how long she stopped at the rear end of the coach before she turned around to go back, and what she did while she was there?

A. I could not say just how long. She came to the rear end of the coach evidently intending to go out there, I supposed at the time, and there were probably five or six parties standing up in the rear end of the coach, and I judged she changed her mind and thought she could not get through there, and went back to the other end. She came from the west end of the coach.

On cross-examination he testified:

Q. Did you take any special account of the time the train stopped there?

A. No, sir; I made no note of the time any more than I know that it stopped.

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C. W. Hoxie, who was standing near the rear door of the smoking car and directly facing the front door of the ladies' car when the train pulled out, testified that after it had started a lady came rushing out of the ladies' car and, in the language of the witness, "she got on the platform and rushed right off." He further testifies:

Q. About how fast was the train going when she jumped off?

A. It was moving pretty fast—as fast as a train usually is when it pulls out of a place. I judge it was about 150 feet from the platform, it was very close to the creek I know.

Q. Explain what she did when she got out of the car.

A. I could not say, she came out of the car and seemed to be a little excited and just simply went right off of the train. She may have stepped down a step, but I just saw her a minute and she was going and went right off.

Q. Did she take hold of the hand rails?

A. No, sir; I did not notice that; it was done in a second really; she came out of the door there.

Q. I will ask you about how long the train stopped at the station?

A. It was about the usual time, a minute and a half or two minutes; it was not very long, about the usual time they stop at local stations; I did not pay attention to it; it was about the usual time trains stop, and the conductor got off; I presume it was the conductor, I heard him call "all aboard," and the train started.

Wm. Bougart, a passenger, testifies that the train stopped about two minutes; that after getting off he walked over to the park fence, where he saw the plaintiff fall from the front platform of the rear car.

The foregoing is believed to be a fair summary of the evidence; and such parts thereof as we are referred to by the defendant in error to support the judgment are set out at length. It has been repeatedly held that a verdict will not

be disturbed by this court where the evidence is conflicting, although the weight thereof may appear to be with the unsuccessful party. But that rule does not apply when it is clear that material undisputed evidence has been disregarded by the jury, and which, if considered and given due weight, would require a different verdict. (*Dunbier v. Day*, 12 Neb., 596.) If our conclusion is to depend upon the mere opinions of the several witnesses as to the length of the stop at Cushman park, this case might be held to be within the rule above stated. But it is impossible to reconcile the testimony of the plaintiff's witnesses with the facts disclosed by the uncontradicted evidence of the disinterested witnesses for the defendant below. The claim that she could not have reached the station platform in safety from her position, four seats distant from the door of the car, within the time required for one passenger to alight on the opposite side, walk the length of the car, and, after crossing between the cars, reach the park gate fifty feet distant, and for others to walk from the train to a point inside the park fence, is not only improbable but unreasonable and insufficient to warrant a finding in her favor upon that issue. It is by law made the duty of railroad companies to stop their trains at stations a sufficient time for passengers to get on and off the cars in safety. And it is universally held to be negligence for the conductor or other servant to start a train while passengers are obviously in the act of getting on or alighting therefrom. But if the train has stopped a reasonable time and passengers have not given notice or other evidence of their intentions to alight, the starting of the train is not *per se* negligence for which the company will be held liable. (*Chicago, St. L. & N. O. R. Co. v. Scurr*, 59 Miss., 456; *Trigg v. St. Louis, K. C. & N. R. Co.*, 74 Mo., 147; *International & G. N. R. Co. v. Terry*, 62 Tex., 380; *Raben v. Central Ia. R. Co.*, 73 Ia., 579; *Clotworthy v. Hannibal & St. J. R. Co.*, 80 Mo., 220.) It is argued that the duty of the conductor is to person-

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ally assist passengers entering and leaving the cars. We have not, however, been referred to any authority for such contention. It is the duty of a railway company to give warning before starting trains, and to render passengers reasonable or necessary assistance in entering and leaving the cars; but we are aware of no rule which imposes such duty upon the conductor to the exclusion of other servants of the company. The only negligence charged in the petition is the starting of the train without giving the plaintiff therein sufficient or reasonable time in which to alight. But as appears from the record, it is impossible to reconcile that claim with the undisputed facts in the case. There was therefore a failure of proof to sustain the allegation of negligence and the motion for a new trial should have been sustained upon that ground. We have not overlooked the rule stated in *City of Lincoln v. Gillilan*, 18 Neb., 114, viz., that where the facts, although undisputed, are of such character that different minds may draw different inferences therefrom, as to whether such facts establish negligence, it is a proper question for the jury and not for the court. That is an old and sound rule, but is subject to the qualification that the inference of negligence must be a *reasonable* one. And the question of its reasonableness, that is to say, whether the particular act of negligence charged can be found from the established facts of the case, without reasoning irrationally and without rejecting common sense as well as the rules of cause and effect, is one exclusively for the court. No clearer or more accurate statement of the rule can be found in the books than that of Judge Thompson in his work on Trials, viz., "That the judge is authorized to nonsuit the plaintiff or direct a verdict for the defendant, according to the mode of practice in the particular jurisdiction, in either of the following cases:

"1st. Where all the facts which the plaintiff's evidence fairly tends to prove, if admitted to be true, would not authorize a conclusion that the defendant has been guilty of negligence as matter of law.

"2d. Where, either upon the plaintiff's evidence, assuming it to be true, or upon the state of facts shown by the evidence in the whole case, which stand undisputed and which ought not therefore to be left to the decision of the jury, an inference unavoidably arises that the person injured was guilty of negligence materially and directly contributing to produce the accident complained of." (Thompson, Trials, 1667.)

But aside from the question of negligence on the part of the defendant company, it is clear from her own testimony that the plaintiff was guilty of such contributory negligence as will defeat her right to recover. It was held in effect in *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143, that it is not in every case negligence *per se* for a passenger to jump from a moving train; but where the attending circumstances are such as to render the act obviously and necessarily perilous, the well established rule is that it is such contributory negligence as will bar a recovery. Cases almost without number might be cited in support of the rule just stated, but it is sufficient for our purpose to refer to the following text-books: Ray, Neg. of Imposed Duties, p. 390; Beach, Contributory Neg., secs. 146, 147; Deering, Neg., sec. 95; Wharton, Neg., sec. 369 *et seq.*; 1 Thompson, Neg., 459; 2 Am. and Eng. Ency. of Law, 765.

It is said by Mr. Beach, in section 146, cited above: "In a majority of instances, however, where the character of such an act has been an issue, it has been held contributory negligence. * * * The weight of authority is to the effect that while an attempt to board a moving train of cars is not *per se* negligence, it is nevertheless presumptively negligent, and in a majority of cases actually negligent to the extent of preventing a recovery." We have no occasion to discuss further the general rule, since it is evident that the effect of our statute has been to enlarge the liability of railroad companies for injuries to passengers.

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It is provided by sec. 3, art. 1, of ch. 72, Comp. Stats., that "Every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the *criminal negligence* of the persons injured." The question to what extent, if at all, the common law liability of a railroad company for *its own* negligence has been enlarged by the statute quoted is not involved in this controversy. The term criminal negligence was held in *Omaha & R. V. R. Co. v. Chollette, supra*, to mean gross negligence, such as would amount to a flagrant and reckless disregard of one's own safety and a willful indifference to the injury liable to follow. Viewing the act of the plaintiff in its most favorable light, she was guilty of criminal negligence within the foregoing definition. She appears to have acted recklessly and without regard to the consequences, and to have jumped from the moving train without thought of where or how she would land.

Exception was taken to several of the instructions by the plaintiff in error, but as the judgment must be reversed for reasons stated they will not be considered. The judgment of the district court is reversed and the cause remanded for further proceedings therein.

REVERSED AND REMANDED.

NORVAL, J., concurs.

MAXWELL, CH. J., dissenting.

This action was brought by the defendant in error against the plaintiff in error to recover for personal injuries sustained by her in alighting from the plaintiff in error's train. On the trial of the cause the jury returned a verdict in her favor for the sum of \$5,000, upon which judgment was rendered. The first objection is that the proof does not sustain the charge in the petition. The petition is as follows:

"Plaintiff for cause of action says that Charles E. Casey is her duly appointed, qualified, and acting guardian under appointment of the county court of Pawnee county, Nebraska.

"2. That the defendant is a corporation duly organized under the laws of Nebraska, and is a common carrier of persons and property for hire; that it owns and operates a railroad from the city of Lincoln through Cushman park, a station on the line of said railroad.

"3. That on the 5th day of July, 1889, the plaintiff purchased of defendant a ticket entitling her to a passage on its cars from Lincoln, Nebraska, to Cushman park; that plaintiff thereupon entered and became a passenger on the cars of defendant on said railroad and rode therein to said Cushman park station; that upon arriving at said station she started to alight from said train, and while so attempting to alight the defendant negligently and carelessly, and without giving plaintiff sufficient or reasonable time in which to alight, started its said train, whereby plaintiff was thrown violently to the ground without any fault or negligence on her part; that by reason of her being thrown to the ground as aforesaid, plaintiff was permanently injured, in that her leg was broken, her body bruised, and her spine injured; that by reason of her said injuries plaintiff was sick for several months, and necessarily expended for physicians' services the sum of \$300, and her health has been greatly and permanently impaired, in all to her damage in the sum of \$15,000. Wherefore the plaintiff prays judgment against the defendant for the sum of \$15,000 and costs of suit."

There is a great conflict in the testimony, but the following facts appear to be sustained by the weight of the evidence. The defendant in error at the time of the accident was about seventeen years of age. She was a passenger on the train for Cushman park, about three miles from Lincoln. She was in the last car in the train and was sitting

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in about the fourth seat from the front end of the car. The train was crowded with passengers, there being a number standing in the aisle in the last car back of the defendant in error. The conductor had not completed gathering the tickets when Cushman park was reached and did not go out of the car, but trusted to the brakeman to stop and start the train. The defendant seems to have risen from her seat when the train stopped and looked back towards the rear end of the car as though she would have gone out that way, but seeing the passage way blocked with passengers she went out of the front end of the car, alighting after it had passed the platform, and was very severely injured. If the plaintiff in error is liable the judgment is not excessive. But it is said that the testimony does not support the allegations of the petition. The defendant in her testimony says:

I got on the train. I bought my ticket at the B. & M. depot and got on the train. I had not rode very far until the conductor came and took up the ticket. He said something when he took up the ticket; he seemed to be vexed. I can't state just what he said, but he said he did not see why people bothered the company in riding such short distances; he did not see why there were not teams to take people such short distances in the country; he did not see why people should bother the B. & M. to stop at such places as Cushman park, because there was no station there. That was all he said, and I did not think anything about it, as I have heard other ladies say he had made the same remarks to them. I rode until I got to Cushman park, and as I got to Cushman's house, a white house this side of Cushman park—

Q. How far?

A. I should think it was a half of a quarter or a quarter of a mile. I raised up just about like that (witness raising up in chair and leaning forward) to look out towards the park to see—I expected to see Mr. Beerup's little children.

They had told me that day that my brother had been sun-struck and was real sick, and that was the reason I wanted to see him, and why I looked out, but I did not see them. So I supposed I could get off all right, so when the—when I supposed the train had stopped I walked out to the front. I was in the last coach, and I walked to the front of the coach and looked behind me and seen the conductor talking to some one, and the aisle seemed to be filled with men as I looked back behind me. I think it was about the fourth seat from the front, and when I looked behind me I seen he was standing there, so I just went right out.

Q. Which way did you go out?

A. The front of the coach.

Q. How far did you sit from the front door?

A. About three or four seats back. I can't remember which, I think it was four. I went out, and just as I was going, before I opened the door, I looked through the door and I could see, through the glass door, the brakeman—I could tell it was the brakeman by his cap, and just as I got out I looked down and I seen the platform just as I got out of the door. I don't remember looking toward the platform any more; I remember looking down at my feet where I was to step. I stepped one step, and as I stepped the other step—the wind was blowing real hard—and I raised my foot, and as I stepped, I did not step on the platform and it threw me to the ground. I laid there until some one came and picked me up. I don't remember seeing the platform after I took the second glance out; I seen the step when I stepped and then I stepped right off in the air.

Q. When did you first discover that the train was moving—that is, if it was moving?

A. I did not know that the train was moving; I did not realize that the train was moving at all; I supposed it had stopped.

Q. Had it stopped prior to this time?

A. They said it had, but I could not state that it had ; I have no knowledge of the train stopping whatever. So I was picked up and the train went on, and I remember the train backing back, and I remember the conductor saying after they had carried me to the stile, he said, "If I had known you was on the train and wanted to get off I would have been glad to have helped you off." He seemed to be very sorry that I was hurt.

Q. Did the conductor get out of the car when the train stopped? I don't mean when they backed up.

A. No, sir; he was standing right there talking to the men.

Q. Did you not see either the conductor or the brakeman on the platform?

A. No, sir; I expected one or the other to help me off, it was quite a step, but I remember him saying if he had known it, he would have been glad to help me off. There was a physician on the train that said my ankle was broken.

On cross-examination she testifies:

Q. What did you have in your hands?

A. A parasol, that is all.

Q. Did you let go of that railing?

A. Yes, sir; I can't say; of course, I suppose as I stepped—yes, I let go of the railing just as I stepped.

Q. Did you get down more than one step?

A. I stepped one step; you know there is only two steps, isn't there, that is one step and then a step to the ground.

Q. How many steps down did you go from the top?

A. I can't remember that.

Q. You took hold of the railing with the left hand and got off on the left-hand side of the train; that is, you took hold of the railing next to the car.

A. Yes, sir; there was a kind of a brass piece there.

Q. The train was headed west and you got off on the left-hand side of the train towards Cushman park?

A. Yes, the side that faces the gate; I don't remember

about the direction, I am always turned around about directions.

Q. What I mean to say is—of course, we know when a train is going out of Lincoln that way is going west?

A. Yes, sir.

Q. And you got off on the left-hand side?

A. Yes, sir.

Q. When you first got out there to the station, did you say you went back to the rear end of the coach?

A. No; I raised up and looked back to the rear end of the coach, as I showed you a while ago; I first looked out, then I looked up and seen the conductor standing there.

Q. He was back at the rear end taking up tickets?

A. He was right in the center or near the center of the coach talking to some men, and I think the aisle was full and crowded with men; I think some of them were sitting with their feet in the aisle, sitting on the arms of the seats with their feet in the aisle. He was standing there.

Q. Is it not a fact now that you went back to get off that way; you went back to where the conductor was and saw that the aisle was crowded, and then turned and went to the front?

A. No, sir.

Q. Did you not so tell the conductor after you was hurt?

A. No, sir.

Q. And the other people that were there?

A. No, sir.

Q. What did you mean by saying that you had no knowledge of the stopping of the car?

A. I said I supposed the train was stopped when I stepped off and that I did not know it was moving; if it was moving I did not know it.

Q. You did not wait long enough to see whether it was going or standing still?

A. No, sir; I supposed it had stopped, because I had

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only got to the outside and I thought it would stop long enough to let me off, but I don't know that I thought anything about it, only I think now that I supposed at the time that it was stopped and I stepped off in the air.

A disinterested witness who was near at hand testifies that the train did not stop to exceed forty seconds; it appears from other testimony that the train had three other passengers who evidently were near the door or on the platform, and alighted from the train, and it apparently started again before the defendant in error had an opportunity to get off. The testimony shows that the platform at Cushman park was 215 feet in length and about seven feet in width; that it was quite low down, not higher than the rails, if so high; that the wind was blowing quite strongly—almost a gale—so that it was difficult, apparently, for a woman to control her clothing.

The testimony of the plaintiff below appears to be truthful, and, fairly construed, amounts to this: that the train stopped at Cushman park; that she had been informed that her brother had been afflicted by sunstroke; that she was very anxious to stop at the park and that as soon as the train stopped arose up from her seat, looked back and went out of the front end of the coach to leave the car; that she expected the train to stop for a sufficient length of time to enable the passengers to leave the train without undue haste, and as she started down the step of the car she saw the platform but was carried by before she alighted, although she was not aware of the fact until she fell.

It is the duty of the conductor of a railroad train to look after the passengers that wish to get on or off at the various stations along his line. (Thompson, *Carriers of Passengers*, 369.) He represents the company; is its authorized agent in all matters connected with the receiving and discharging of passengers as well as the subordinate servants of the corporation. The company recognizes this obligation, and the conductor, in his testimony, after

stating that the stop was longer than usual, about three minutes in all, says:

A. Yes, sir, it was longer than usual.

Q. Why?

A. On account of the train being crowded and I not being able to get out and see the passengers get off myself, but I had my brakeman do it, and he did not know when they were all off exactly, and he thought he had given them ample time and did not see any more coming and he started the train.

Q. About how many passengers got off there, do you know?

A. I think there were five.

Q. Besides this girl?

A. Four, I think, besides the girl.

The brakeman did not know, he says, when the passengers were all off exactly, and started the train. This is evidence of negligence. (*Bucher v. New York C. & H. R. Co.*, 98 N. Y., 128; *Wood v. Lake Shore & M. S. R. Co.*, 49 Mich., 370; *Brooks v. Boston & M. R. Co.*, 135 Mass., 21; *Detroit & M. R. Co. v. Curtis*, 23 Wis., 152, 27 Id., 158; *Southern R. Co. v. Kendrick*, 40 Miss., 374; *Imhoff v. Chicago & M. R. Co.*, 20 Wis., 362; *New Orleans, J., & G. N. R. Co. v. Statham*, 42 Miss., 607; *Milliman v. New York C. & H. R. R. Co.*, 66 N. Y., 642; *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St., 292; *Jeffersonville, M. & I. R. Co. v. Parmalee*, 51 Ind., 42; *Keller v. Sioux City & St. P. R. Co.*, 27 Minn., 178; *Swigert v. Hannibal & St. J. R. Co.*, 75 Mo., 475; s. c., 9 Am. & Eng. R. Cas., 322; *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill., 296; s. c., 9 Am. & Eng. R. Cas., 264; *Pennsylvania Co. v. Hoagland*, 78 Ind., 203; s. c., 3 Am. & Eng. R. Cas. 436; *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill., 19; *Fuller v. Naugatuck R. Co.*, 21 Conn., 557; *Davis v. Chicago & N. W. R. Co.*, 18 Wis., 185; *Paulitsch v. New York C. & H. R. R. Co.*, 26 Am. & Eng. R. Cas., 162; 2 Am. & Eng. Ency. of Law, 762.)

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Had the conductor in this case done his duty there is reasonable ground to believe no accident would have happened. It may be said that the conductor delegated his authority to the brakeman, and that for that purpose he took the place of the conductor. It is sufficient to say that the proof fails to show that the plaintiff saw the brakeman, except at a distance. She did see the conductor on the same car with herself. He found fault with the inconvenience of stopping the train at that place. He had taken up her ticket but a short time before the train stopped, and it was his duty to see that she was permitted to leave the train safely. The train evidently stopped but a short time, not long enough for the passengers to alight safely, the testimony to the contrary notwithstanding. Where a conductor or person in charge of the train gives a signal to start while a passenger is obviously in the act of getting off the train the company will be liable if injury occurs. (2 Am. & Eng. Ency. of Law, 763; *Swigert v. Hannibal & St. J. R. Co.*, 75 Mo., 475; s. c., 9 Am. & Eng. R. Cas., 322; *Bucher v. New York C. & H. R. R. Co.*, 98 N. Y., 128; *Keating v. New York C. & H. R. R. Co.*, 49 Id., 673; *Mitchell v. Western & A. R. Co.*, 30 Ga., 22; *Chicago W. D. R. Co. v. Mills*, 105 Ill., 63; s. c., 11 Am. & Eng. R. Cas., 128; *Conner v. Citizens S. R. Co.*, 26 Am. & Eng. R. Cas. [Ind.], 210; *Eppendorf v. Brooklyn C. & N. R. Co.*, 69 N. Y., 195; *Nance v. Railroad Co.*, 26 Am. & Eng. R. Cas. [N. Car.], 223; *Straus v. Kansas City, St. J. & C. B. R. Co.*, 86 Mo., 421; s. c., 27 Am. & Eng. R. Cas., 170; 2 Am. & Eng. Ency. of Law, 762.) He testifies in regard to the plaintiff:

Q. Did you look out to see whether the lady got off?

A. The lady was a regular customer of ours and I supposed she knew enough to get off before the train started.

Q. How many times did she ever ride with you?

A. A dozen times I guess; not less than a dozen and probably more.

Q. And you thought she could take care of herself?

A. Yes, sir, I thought so.

Here is self-confessed negligence on his part. Here was a young girl, in experience but little more than a child, so far as appears, unaccustomed to travel, who had paid her fare to and desired to stop at the park, yet the man who had just taken up her ticket, and whose duty it was to see her safely on the platform, confesses that although in the same car with her and but a short distance away, he did not even look around to see if she had left the car. In the majority opinion great stress is laid upon the testimony of two or three witnesses called by the plaintiff in error as to the length of time the train stopped. The conductor had seven or eight tickets to take up and did not seem to have completed taking up the same when the train started, yet he testifies the train stopped three minutes, and some of the other witnesses for the plaintiff in error testify to substantially the same facts. That this testimony is not true is shown by all the circumstances of the case. The greatest distance any passenger is shown to have gone from the train when it started could have been traveled in much less than a minute—probably in one-half of that time. We must remember that these witnesses did not have any particular cause to note the length of time the train stopped—some or all of them evidently in conversation and probably scarcely conscious of the stoppage of the train; yet upon this kind of testimony it is proposed to establish a preponderance of the evidence against the verdict. The number of witnesses, where they have equal means of knowledge and are supported by all the circumstances of a case, no doubt should have great weight in arriving at a verdict, but ordinarily testimony is not given weight by the number of witnesses who testify to a particular fact, but by the means of knowledge of the witness, his apparent fairness and freedom from bias, and the support of circumstances. Thus a passenger who desires to stop at a station

and rises from his seat to leave the train as soon as it stops will know much more about what he did than passengers who have no interest in the matter and take no notice of so common an occurrence as a passenger alighting from a train. The evidence of the first witness is positive and direct, while that of other passengers is negative and unreliable. Now in the case at bar the plaintiff below testifies, in substance, that she rose from her seat and went out of the front door of the car, which could not have taken her more than half a minute, and in this she is corroborated by the circumstances heretofore spoken of. But there is another phase of this case which shows negligence on the part of the conductor and employes. In all parts of this country the rule is when a train approaches a station that a brakeman or some employe of the company appears at the door of the car, where passengers are expected to go out, and announces the name of the station. In most cases he opens the door as the train stops for such passengers as desire to leave to do so. In this case not only was this not done, but the conductor from the back part of the car called out the name of the station. This no doubt had a tendency to confuse the plaintiff below, if she was confused. The station being called from the hind end of the car, and no one appearing at the front end, she would be excusable if she supposed she was expected to get out there. Suppose either the conductor or brakeman had appeared at the front end of the car when the train stopped, and opened the door and called out the station, it is very evident to my mind that this accident would not have happened. That the plaintiff below was expected to go out at the front door of the car is shown from the fact that the brakeman walked along the platform from the hind end of the car to the front end, and apparently then signaled the engineer to start. The testimony, as I understand it, shows gross and inexcusable negligence on the part of the employes in control of the train. A great deal more testimony to the same

effect could be stated, but I do not care to discuss the subject further. It is very clear that the testimony fully sustains the cause of action.

2. It seems to be admitted that the instructions are predicated on the proof, and therefore they need not be set out at length.

3. In regard to the injury, a number of affidavits were filed by the plaintiff in error in support of a motion for a new trial, in which it is stated, in substance, that the verdict is excessive by reason of the injuries not being severe. These affidavits are exceedingly vague and indefinite and charge generalities and not specific facts. Dr. Crim, who has attended the defendant in error, testified on the trial as follows:

Q. I will ask you to describe what the injuries were.

A. The left ankle bore evidence of having been sprained; that is it was tender on the sides and was discolored about the ankle and for a distance of about five inches up the outer side of the leg. The point of greatest tenderness, however, was two and one-half inches above the ankle bone on the outer bone of the leg; at that point, on pressure, there was exquisite tenderness to the bone, going to show that the bone was cracked or partially fractured about two and one-half inches above the external malleolus, or the smaller of the two bones of the ankle. If she attempted to bear weight on the foot the foot turned in so that the ankle was not firm at all. The other injuries that she complained of at that time was some pain near the spinal column in the lower part of the back and she was also quite sick to her stomach; the injury of the spine at that time I did not give any special examination as I was called to see the ankle and to dress it. I put a water-glass dressing on the leg, which remained for two or three weeks and was then taken off. I think that covers the ground of the first examination.

Q. I was going to ask you how you knew that the bone was broken?

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A. In examining the bone the first thing that drew my attention to it was the pain in one spot. The discoloration also pointed to a severe injury having taken place there at a previous date. Then I placed my thumbs on the bone and grasped the limb firmly and pressed with the thumbs and the bones would give together, and took the other limb and it did not give to any such extent, showing that the bone was not as strong as the one on the opposite side. If the bone had not been fractured it could not give.

Q. What kind of a fracture was it?

A. A green-stick fracture.

Q. Why do you call it a green-stick fracture?

A. Because the bone was not fractured clear across so as to cause displacement. It is the kind of a fracture that you have if you bend a twig and the fibres break on one side and hold on the other.

Q. Did you make any other examination afterward as to the spine?

A. I was called a month or so later to see her on account of her spine.

Q. Tell the jury what observations you made and what examinations you made in regard to that injury.

A. The patient was complaining of a great deal of pain in the lower two-thirds of the spine and with difficulty in walking; the pain was so severe that it bothered her about locomotion. At that time I was called to give an opinion as to whether a cautery would give her relief.

Q. Explain what a cautery is?

A. The cautery used is a piece of platinum heated to white heat by means of benzine blown through it so that this white heat would strike the back probably forty times lightly so as not to destroy the skin deep but to destroy the outer part of the skin and produce irritation. The pressure on the spinal processes, that is, the tips of the backbone, showed marked tenderness; I was informed by her attending physician that this operation was followed by

a great deal of relief, but I did not see her again for two months, or not to examine her carefully anyway.

Q. Go on and state what examination you made subsequent to that time.

A. The next time I was called was about the middle of October, or some three months after the time when I first saw her. At that time she was confined to the bed, and on being assisted out of the bed she could not walk without catching hold of something, she was then replaced in bed and the bed clothes thrown back over the lower extremities in such a way as to prevent her eye from seeing what manipulations I might make. I then took some steel pointers which we use for discovering whether a person has the natural sense of feeling pain, and found that she could not tell whether I had one or two points on any part of the leg below the knees, and I also forced the points of the pointer completely through the skin without any flinching or any sense of pain or reflex action on her part. I continued this examination, going above the knee, and when about half way between the knee and the hip, or one side of the thigh she began to show some signs of sensation; a like sensation extended just above the middle of the hip, but beyond that point the sensation increased rapidly so that by the time I reached the region of the waist the sensation was about normal. The tenderness of the spine extended up to about the neck; the entire region of the entire spinal column was tender, especially on pressure of the finger. I again applied the cautery from the neck clear down the whole length of the column. I saw her again in about a week and repeated the operation, and again about ten days later. At each subsequent cauterization I found the patient improved, so that at the third one she was able to walk fairly well and the sensation was nearly normal in the lower extremities; from that time I have seen her at periods varying from two weeks to three or four months up to the present time. I have repeated the cauterization at various

times. Sometimes the relief would extend over three or four months and sometimes not so long as that. The sensation of the limbs has been about normal since the third or fourth cauterization, but the tenderness of the spine has never completely disappeared.

Q. I would like to ask you if when a person receives a concussion of the spine it is always manifested immediately?

A. Symptoms may be manifest immediately in a severe concussion; on the other hand it may be several weeks before any symptoms appear.

Q. Why is that?

A. The hurt may be inflamed, and the injury which gave rise to the inflammation may not be severe enough to cause the patient much inconvenience at the time, but the coagulation of the blood may continue to work injury to the case from that time on.

Q. When was the last time you examined the plaintiff?

A. I should say about four to six weeks ago.

The affidavits do not dispute this testimony, and in addition to being cumulative are wholly insufficient. In the majority opinion the rules as to negligence and gross negligence as heretofore established by this court are approved, while the decision itself, in my view, practically overrules both. In a case like that under consideration the testimony should be submitted to the jury. If a court assumes to take testimony of this kind, where the principal question is the credibility of the witnesses, away from the jury and pass upon its sufficiency, the provision of our constitution that "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay," is a glittering generality—meaningless verbiage of no force or effect. But I think we have not yet reached that point. I believe this is a meritorious case where the plaintiff below, with-

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out her fault, sustained severe and lasting injuries, and that she is entitled to compensation for the same. Many other reasons could be given why this judgment should not be reversed, but because of the great length of this opinion they will be omitted. I fear the general rule established will be productive of great injustice, not only in this case but generally. In my view the judgment is fully supported by the evidence and should be affirmed.

STATE OF NEBRASKA, PLAINTIFF, V. FARMERS &
DROVERS BANK OF BATTLE CREEK, DEFENDANT,
AND E. TILLOTSON, INTERVENOR.

FILED APRIL 11, 1893. No. 4821.

Evidence in the record examined, and *held* to sustain the finding of the referee in favor of the claimant.

ORIGINAL action to wind up the affairs of the Farmers & Drovers Bank of Battle Creek, Nebraska, under the banking law of 1889.

The receiver appointed by the court refused to allow the claim of E. Tillotson, and a referee was appointed to investigate the validity thereof. The finding was in favor of Tillotson, and the receiver excepted. *Exceptions overruled.*

Wigton & Whitham, for intervenor.

George H. Hastings, Attorney General, for receiver.

Post, J.

The Farmers & Drovers Bank of Battle Creek was impounded under the provisions of the state banking law, and is now in the hands of a receiver and under the jurisdiction of this court. Among the claims presented to the

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receiver for allowance was one by E. Tillotson for \$3,000 and interest at six per cent from February 24, 1891, on account of eight certificates of deposit of said bank for \$375, each bearing the date above named. The receiver, for reasons which will appear from this opinion, refused to allow said claim, and referred it to the court for advice. By agreement of the claimant and the attorney general representing the receiver, the questions involved in the controversy were submitted to a referee with instructions to find the facts and state his conclusions of law, and who subsequently submitted the following report:

"First—That on or about the 24th day of February, 1891, the Farmers & Drovers Bank of Battle Creek, Nebraska, made and delivered to E. Tillotson its twelve certificates of deposit of three hundred and seventy-five dollars each, aggregating \$4,500, due and payable, the first in one month, and the others at intervals of one month each thereafter, all drawing interest at six per centum per annum.

"Second—That said Farmers & Drovers Bank paid the first four of said certificates of deposit on the receipt of same by the bank in the usual course of business, and that E. Tillotson is the holder and owner of the remaining eight certificates of deposit, and that the same are due and wholly unpaid.

"Third—That the said certificates of deposit were presented to the Farmers & Drovers Bank, or the receiver thereof, at their maturity, and payment demanded, and refused for want of funds, or from want of an order of court directing payment.

"Fourth—That the consideration for the issuance of said certificates of deposit was two certain notes and mortgages, designated as the 'Dinkle and Tiedgen notes,' of a face value of \$5,000, several small unsecured notes of a face value of about a thousand dollars, and a small balance on deposit with the bank amounting to \$137.

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"Fifth—That the sale of these securities was made by E. Tillotson in person, and on the faith of the solvency of the bank, with which he dealt, through its president, R. H. Maxwell.

"Sixth—That said certificates of deposit were never entered as a charge or liability of the bank on its books, but of this E. Tillotson had no knowledge until long after the issuance thereof, but had reason to believe and did believe that said certificates represented a *bona fide* indebtedness of the bank to the owners of said certificates.

"Seventh—That at the time of the issuance of the said certificates of deposit E. Tillotson had no knowledge of the insolvency of the bank issuing them, but took them in the ordinary course of business, in good faith, relying on the solvency of the bank and the *bona fides* of the whole transaction for his security.

"CONCLUSIONS OF LAW.

"That the amount of three thousand dollars, with interest thereon at six per centum per annum from and after the 24th day of February, 1891, is justly due and owing to E. Tillotson from the Farmers & Drovers Bank of Battle Creek, Nebraska, and that the receiver of said bank should enter for payment and pay the said certificates of deposit, as other claims not contested."

Upon the coming in of the above report a motion for confirmation thereof was made by the claimant, and exceptions thereto were filed by the receiver, which are submitted together. In considering the questions presented by the exceptions it is necessary to refer to some facts disclosed by the record in addition to those found by the referee. From some time in the year 1887 until the 1st day of July, 1890, R. H. Maxwell was conducting a private bank at Battle Creek, Nebraska, known as the Farmers & Drovers Bank, and also engaged in negotiating loans upon real estate. Among his clients was Tillotson, the claimant, for whom he negotiated several loans, the mort-

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gages, notes, and coupons, so far as the record shows, being executed in favor of Mary E. Tillotson. About the date last named said bank was incorporated under the laws of the state, Maxwell being at all times thereafter its president, and B. Meyel its cashier. About the 24th day of February, 1891, Tillotson, who was then a resident of Chicago, visited Battle Creek for the purpose of closing up his business there. At that time he had a conversation with Maxwell, at which was discussed the sale to the latter of the securities described in the referee's 4th finding, the Dinkle mortgage being for \$2,000 and the Tiedgen mortgage for \$3,000, both maturing June 1, 1893, and both bearing interest at eight per cent per annum. He admits that Maxwell proposed to give his individual note for the agreed amount of \$4,500 and that he offered to accept a note with either of two persons named as security. The secured note not being given, it was agreed that Maxwell should issue twelve certificates of deposit payable to Tillotson's order for \$375 each, the first payable one month after date and one maturing on the 24th day of each month thereafter. In pursuance of that agreement the twelve certificates of deposit were issued and delivered. As to the exact terms of said contract there is a sharp conflict of testimony. Maxwell testifies that he did not represent the bank, but on the contrary it was well understood by Tillotson to be his individual venture, and that the certificates, although issued in the name of the bank, were accepted as his personal obligation. He further testifies that they were to be secured by stock of the bank of face value twice the amount of the certificates. Tillotson on the other hand testifies that his agreement was with the bank alone and asserts that he did not at any time agree to accept Maxwell's personal obligation. The attendant facts, so far as they shed any light upon the subject, are as follows: Upon the conclusion of the agreement between them, Tillotson indorsed each of the mortgages, notes, and coupons attached thereto as follows:

"Pay R. H. Maxwell, or order, without recourse on me.

"MARY E. TILLOTSON, per E. T."

The certificates of deposit do not bear the then current numbers, but appear to have been issued out of the regular order in that respect, and were never entered upon the books as liabilities of the bank; nor were the securities assigned by Tillotson to Maxwell entered at the time of the transaction upon the books of the bank, but on the 27th day of February, according to the testimony of both Maxwell and Meyel, the cashier, they were discounted by the bank; and the several notes and coupons appear upon the discount register under the date last named. There is also upon the daily cash book, under date of February 27 and 28, the following entry:

"Maxwell, R. H. Tillotson, Disc.....\$1,000."

It also appears from the books that four of the said certificates were paid by the bank as they matured and the amount thereof charged to Maxwell's account. The certificates of deposit are *prima facie*, the obligation of the bank, and the burden is upon the receiver to show that they were issued without authority. The material question is therefore one of fact. It is not contended that the purchase of the securities by Maxwell in behalf of the bank would be *ultra vires*. On the other hand it is quite as clear that if the latter, and not the bank, was the purchaser, the certificates of deposit are without consideration and void in the hands of the payee. Although the testimony of Maxwell is corroborated by many of the facts we have mentioned it fails to sustain the claim of the receiver. The proposition that Tillotson would exchange \$5,000 in notes amply secured by mortgage bearing interest at eight per cent, not to mention \$1,000 in notes held by the bank for collection for Maxwell's personal obligation for \$4,500, at six per cent, and that after the latter had confessed his inability to give personal security, is too unreasonable to be accepted upon a bare preponderance of the evidence. The proofs fail to

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satisfy us that the certificates of deposit are not what they appear to be, the obligations of the bank. It follows that the exceptions of the receiver should be overruled and the report of the referee confirmed.

REPORT CONFIRMED.

THE other judges concur.

28	680
51	101

AULTMAN & TAYLOR COMPANY V. FRED P. FINCK
ET AL.

FILED APRIL 11, 1893. No. 4899.

Contracts: FALSE REPRESENTATIONS: EVIDENCE: REVIEW. This cause involving only the question whether or not, justifiably relying upon the representations of plaintiff's agent as to the contents of a written contract, the defendants signed the same, and whether or not said representations were false, the verdict of the jury in favor of the defendants will not be disturbed.

ERROR from the district court of Richardson county.
Tried below before APPELGET, J.

C. Gillespie and Edwin Falloon, for plaintiff in error.

Frank Martin, contra.

RYAN, C.

This suit was brought by the plaintiff in error to recover of the defendants in error the sum of six hundred dollars for their failure to settle for an engine in accordance with the terms of a written contract, made a part of the plaintiff's petition. By the terms of this writing the defendants were to deliver to plaintiff an old engine of which they were the owners and execute notes to aggregate amount of eleven hundred dollars.

The answer alleges that the defendants are not able to understand the English language sufficiently well to read the contract in question; that the agent of plaintiff who prevailed upon them to affix their signatures thereto did so by misrepresenting to them the terms of said contract which they were asked to sign; that the warranty given by plaintiff's agent to defendants in respect to said engine was that the engine to be furnished by plaintiff would operate the threshing machine of defendants better than the engine which defendants already had and were using—if not, defendants were not to pay for the new engine; that having reached this agreement plaintiff's agent said to defendants that it would be necessary for them to sign an order for the engine and presented to defendants a paper which plaintiff's agents represented contained the terms agreed upon as above set forth, and the defendants, relying upon said representations, signed said paper; that upon due trial had of the new engine it did not meet the requirements of the above warranty and defendants refused to accept and settle for the same. To these defenses there was a reply in general denial of the above averments. The warranty actually printed in the contract to which the signatures were affixed was radically different from that recited in defendants' answer. The printed warranty was that the "engine is capable of supplying as much power as any engine of the same horse-power made in the United States, and that it is constructed of first-class material throughout." This was conditioned, however, upon notice of failure to work as required being sent to plaintiff by registered letter, etc.

It is not necessary to state the manner in which the questions considered arose, for, as is evident from the pleadings, the main controversy was as to the correctness of defendants' averments as to the execution of the contract sued upon. That there may be no misunderstanding of the history of these transactions, it is proper to say that the

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evidence shows that the new engine was taken to the defendants and attached to the separator and failed to work as well as the old engine had done—defendants claiming that the failure was due to general inefficiency of the engine—plaintiff's witnesses excusing the failure as being attributable to only the want of a proper pulley which could easily have been supplied and to improper feeding of the threshing machine, the alleged fault of defendants. At any rate the defendants refused to receive the engine and it was soon thereafter taken away by plaintiff's agent and sold at a less price than that which it is claimed defendants were to pay, hence this action in the main for the difference.

There was evidence that defendants were Germans, who did not understand the meaning of the language of the printed contract; that there was within reach no one better qualified in this respect than themselves, except plaintiff's agent, who misrepresented the terms of said printed contract, as to the alleged warranty; that deceived by these misrepresentations defendants affixed their signatures to the printed contract. This was denied by plaintiff's agent, who insisted that before the printed contract was signed he read to the defendants the dates, description of the engine, and the warranty which was in the printed contract as above recited, and with which there is no claim of compliance. The matters in controversy were submitted to the jury upon competent evidence and correct instructions tested by the principles laid down in *Cole Bros. v. Williams*, 12 Neb., 440, and the verdict sustained the defenses set up in the answer. The judgment of the district court must therefore be

AFFIRMED.

THE other commissioners concur.

JOHN FITZGERALD ET AL., APPELLANTS, V. REINHOLD
BRANDT ET AL., APPELLEES.

FILED APRIL 11, 1893. No. 4741.

1. **Bill of Exceptions: SUBMISSION TO ADVERSE PARTIES:**

Counsel for appellants, in a case where the appellees were numerous, whose interests were diverse, and represented by different counsel, left the draft of a proposed bill of exceptions at the office of counsel for one of the appellees, and notified counsel for the others that the proposed bill of exceptions was there for their inspection, and would remain for the time allowed by statute. *Held*, That this was not such a submission of the exceptions as required by section 311 of the Civil Code; and that the bill of exceptions would be quashed as to the appellees, to whom it was not otherwise submitted.

2. ———: **AMENDMENTS: RETURN.** Section 311 of the Civil Code makes it the duty of a party to whom is submitted a draft of exceptions for examination to return it with his proposed amendments, if any, within ten days from its submission.

3. **Appeal: TIME: JURISDICTION.** The time fixed by section 676 of the Civil Code for perfecting appeals in equity cases is jurisdictional; and this court cannot extend it unless it clearly appears that the failure to perfect the appeal is in nowise attributable to the laches of appellants.

4. **Motion for New Trial: REVIEW.** Unless a motion for a new trial is made within three days after the verdict or decision, this court cannot examine any of the errors which it is alleged occurred at the trial.

5. ———: **NEWLY DISCOVERED EVIDENCE.** A motion for a new trial on the ground of newly discovered evidence was properly denied, when such new evidence was competent under the pleadings in the case; and the witness who was to furnish the new evidence testified on the trial, was examined by the applicant for the new trial, and in which examination no effort was made to elicit any of the facts now claimed to be newly discovered evidence.

6. ———: ———: **GROUND FOR NEW TRIAL.** To entitle a party to a new trial on account of newly discovered evidence, it is not enough that the evidence is material and not cumulative; it

38	683
38	70
188	110
38	888

38	683
40	792
41	56
41	196
141	536

36	683
44	137

36	683
49	169
50	399
51	360
51	762

36	683
59	305

36	688
60	740

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must further appear that the applicant for the new trial could not, "by the exercise of reasonable diligence, have discovered and produced such evidence at the trial."

7. **Equity: REVIEW: DECREE: PRESUMPTION OF CORRECTNESS.**

When it is sought to review a decree in equity by error proceedings, and the only error alleged is that the pleadings do not support the decree, every reasonable presumption must be indulged in support of the correctness of the decree; and unless it certainly appears that no such decree as rendered could lawfully be pronounced on the pleadings, it will not be disturbed.

APPEAL and error from the district court of Platte county. Heard below before Post, J.

Lamb, Ricketts & Wilson, C. J. Garlow, Burke & Cunningham, for appellants.

M. Whitmoyer, McAllister & Cornelius, W. H. Munger, and Sullivan & Reeder, contra.

RAGAN, C.

The appellant John Fitzgerald brought suit in the district court of Platte county to recover a sum of money from appellees Brandt and Fleming, for brick furnished them for the erection of a brick hotel on lot 8, block 85, in the city of Columbus, Nebraska, with a prayer for a material-man's lien on the property. In addition to Brandt and Fleming the following parties were made defendants to the suit, and filed answers, most of them for material furnished for the erection of said hotel, viz.: C. A. Mast, August Boettcher, Thomas Price, Hugh Hughes, Charles Schroeder, August Deitrichs, Pomerene & Percival, William Geizer, Hooker & Orr, Peregoy & Moore, and The Adamant Wall Plaster Company.

On October 3, 1890, the court entered a decree, to which John Fitzgerald, The Adamant Wall Plaster Company, William Geizer, Thomas Price, Hooker & Orr, Pomerene & Percival duly excepted, and, at the same time, obtained

from the trial court forty days in which to reduce their exception to writing, which time was on December 22, 1890, at request of appellants, by the trial judge, extended forty days; and on the 22d day of October filed with the clerk of the district court their bond for the appeal of the case to the supreme court.

On December 5, 1890, appellants filed their motion for a new trial. On December 24, 1890, the official reporter of the trial court filed with the district court clerk a duly certified transcript of all the evidence had at the trial. On January 17, 1891, the motion for a new trial was overruled. On April 25, 1891, the trial judge allowed and signed the bill of exceptions, and on May 7, 1891, the appellants filed in this court their petition in error, and submitted a motion to docket the case as an appeal. Appellees Deitrichs and Boettcher at the same time filed a motion to quash the bill of exceptions, on the ground that it was not submitted to them or their counsel for examination before its allowance by the trial judge.

The appellees were represented in the case and on the trial as follows: C. A. Mast, Brandt & Fleming, and August Deitrichs, by Sullivan & Reeder; August Boettcher, D. S. Morgan & Co., and Peregoy & Moore, by McAllister & Cornelius; Columbus State Bank and Hugh Hughes, by M. Whitmoyer; all of whom appear to reside in the city of Columbus and to be members of the Platte county bar.

We will now dispose of the motion of appellees Deitrichs and Boettcher. There is no pretense that this bill of exceptions was ever submitted to either of the appellees or either of their counsel for examination before being signed and allowed by the judge. By the affidavit of one of the counsel for appellants it appears that on February 18, 1891, all the appellees "*interested in the defense on appeal*" were notified, through their counsel, "*That this bill was, or would be, left at the office of Sullivan & Reeder for*

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their inspection and examination and that it would remain there for the time allowed by statute." It does not appear, however, that any of them consented to this. This was not such a submission of the exceptions as is required by the Code, sec. 311. The motion of the appellees Deitrichs and Boettcher to quash the bill of exceptions is therefore, as to them, sustained.

The grounds on which appellants ask to have this case docketed as an appeal are:

"First—For the reason set forth in the affidavit of C. J. Garlow, hereto attached."

I quote the substance of all the affidavits filed for and against this motion, omitting the formal parts.

AFFIDAVIT OF MR. GARLOW.

"C. J. Garlow, being first duly sworn, deposes and says that he is one of the attorneys of the Adamant Wall Plaster Company, one of the defendants in the above entitled cause; that on or about the 18th day of February, 1891, he presented the draft of the bill of exceptions in said cause to M. Whitmoyer, one of the attorneys for Hugh Hughes and Columbus State Bank, defendants also in said cause, and requested the said Whitmoyer to receipt for the same, but he refused to do so, and assigned for his reason that he had been advised by his associate counsel not to do so; that said Whitmoyer retained said bill for about one-half day, and said that he had examined, or partially examined, same, and that there were errors in it which should be corrected; that on the 18th day of February, 1891, the said bill was presented to John J. Sullivan, one of the attorneys for C. A. Mast; that all of the defendants interested in the defense on appeal, or proposed appeal, were notified through their attorneys that the bill, was or would be, left at the office of Sullivan & Reeder for their inspection and examination, and that it would remain there for the time allowed by statute, and that this affiant never refused to receive said bill from the said Sullivan & Reeder, when properly tend-

ered; that he has no recollection of having the alleged conversation with J. G. Reeder at the foot of the stairs of Sullivan & Reeder's office; that the said Whitmoyer was never present at a conversation between this affiant and said John J. Sullivan, concerning said bill of exceptions, to this affiant's knowledge, except when the same was talked over in open court at the court house long after the time mentioned by said Whitmoyer; that the said Whitmoyer spoke to this affiant two or more times concerning the errors in said bill; that said John J. Sullivan never tendered said bill of exceptions to this affiant until the 20th day of April, 1891, nor did he, or any of the other attorneys who make affidavits in this matter, demand of this affiant a receipt for said bill or bring or offer to bring the same to his office and leave it; that the said Sullivan & Reeder may have said that it was ready to return, but if they did so state, they, nor either of them, said that it had been examined by the attorneys interested for other defendants, nor did they offer to return it on behalf of all the parties on whom service had been made and who were equally interested so far as the rights of their clients were concerned; that some of the attorneys claimed that the bill should be left with each firm for the period of ten days, to which affiant remarked that he did not so understand the law, and that he should expect the bill returned to him as required by law, or words to that effect."

AFFIDAVIT OF MR. WHITMOYER.

"M. Whitmoyer, being first duly sworn, deposes and says that in the latter part of February or the first part of March, 1891, this affiant was in the office of Sullivan & Reeder, where C. J. Garlow and J. J. Sullivan were present, and the bill of exceptions in the above entitled action was spoken of, and a conversation held about the same between J. J. Sullivan, C. J. Garlow, and myself, at which time said J. J. Sullivan told said Garlow that he would give him the bill of exceptions in the above stated case and

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he could take it with him, when said Garlow replied that he did not want it at that time, that he could get it at any time he did want it."

AFFIDAVIT OF MR. SULLIVAN.

"J. J. Sullivan, being first duly sworn, says that he is one of the attorneys for C. A. Mast, one of the defendants in said action; that the bill of exceptions in this case was served on affiant as stated in the affidavit of C. J. Garlow; that for the purpose of serving said bill of exceptions said Garlow summoned affiant to the office of said Garlow by telephone; that affiant received said bill when tendered to him and examined same and made the indorsement now appearing thereon; that said indorsement was made on the day it bears date, which is, as affiant now remembers, February 21, 1891, that within a week after said indorsement was made, as shown by the date thereof, affiant tendered said bill of exceptions to said Garlow at the office of affiant in the city of Columbus which said office is only one block distant from the office of said Garlow; that said Garlow stated that he did not want said bill of exceptions at that time and refused to receive it; that said Garlow then and there further stated that he would take said bill of exceptions some other time; that said Garlow never did afterwards, until April 20, 1891, call for or ask for said bill of exceptions, although in meantime he was very frequently in affiant's office and saw and talked with affiant almost daily; affiant further states that prior to April 20, 1891, no person representing any of the appellants herein ever asked for or requested the return of said bill of exceptions."

AFFIDAVIT OF MR. McALLISTER.

"W. A. McAllister being first duly sworn says he is one of the attorneys for August Boettcher and August Deitrichs, two of the defendants in the foregoing action; about the latter part of February, 1891, C. J. Garlow, attorney for the Adamant Wall Plaster Company, one of the defend-

ants herein, requested the affiant to accept service of the bill of exceptions in this action, without delivering said bill of exceptions to the affiant, saying at the time: 'I am too busy to carry this bill of exceptions to all the attorneys interested, I want you all to receipt for it now, and I will leave it at some central place where you can all get it or examine it,' or words to that effect."

AFFIDAVIT OF MR. REEDER.

"J. G. Reeder, being first duly sworn, deposes and says that he is one of the attorneys for C. A. Mast, one of the defendants in the above cause; that about ten days after the bill of exceptions in this case had been served on the firm of Sullivan & Reeder, affiant met C. J. Garlow at the foot of the stairway leading to the office of the said Sullivan & Reeder; that said Garlow inquired of affiant if the said bill of exceptions was ready; that affiant informed him that the bill was ready for him and offered to go upstairs and get it for him, but was informed by said Garlow that he did not want it at that time, but would call for it when he wanted it; that about a week or ten days after said conversation said Garlow was in the office of Sullivan & Reeder and in a conversation then had between said Garlow and affiant relating to said bill of exceptions affiant offered to give said bill to said Garlow, but said Garlow stated that he did not want it then, and would come after it when he wanted it; said bill was not again mentioned to said affiant by said Garlow until April 20, 1891, although affiant met him daily upon the streets and at other places, and held frequent conversations with him."

We have come to the conclusion that the failure of the appellants to procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the court below, within six months after the date of the decree, cannot be attributed to the act of the appellees, or any of them.

As a matter of law, appellants' contention that it was the duty of Sullivan & Reeder to return the draft of exceptions to appellants within ten days after its submission is correct; but this evidence falls far short of establishing the fact that appellants were deprived of the opportunity to file their transcript here in time for appeal, by reason of Sullivan & Reeder's not returning the draft of exceptions in ten days after its submission.

"Second—For the further reason that the court took said cause under advisement and had it under advisement for about — days, and during the time it was under advisement the court received further evidence on which said judgment was rendered."

Appellants offer no proof of this, and were it admitted, it would not confer any authority on this court to extend the time for appeal. The motion of appellants to docket this case as an appeal must therefore be overruled.

Appellants' motion for a new trial, *for errors occurring thereat*, not having been made within three days after the rendition of the decree, "we are precluded from examining any of the errors which it is alleged occurred during the trial." (*Carlou v. Aultman*, 28 Neb., 672.) Appellants insist, however, that the court erred in overruling their motion for a new trial on the ground of newly discovered evidence. The affidavits filed in support of and against this motion are very numerous and very voluminous, and it would subserve no useful purpose to quote them here. Appellants' affidavits in support of this were directed to the point that appellee Mast was given a lien on the property; and that since the decree the appellee Fleming had told one of the counsel for appellants that he, Fleming, would now swear that Mast was interested in the hotel; as owner, I suppose—though the record does not say—that he, Fleming, was Mast's agent in overseeing the erection of the same; that Mast furnished money and material used in its erection, and that the appellants had no

knowledge until after the decree that Fleming would testify as alleged.

The affidavits and other evidence of appellees used on the hearing of this motion not only contradicted the affidavits of appellants, but affirmatively showed that Mast had no such interest in the property as was claimed. In addition to this, the records disclose the fact that appellants in their pleadings claimed that Mast was interested in the hotel; and on the trial Mr. Mast and Mr. Fleming both testified and were cross-examined by counsel for appellants—their examinations in full were used on the hearing of this motion—and no inquiry was made of Fleming or Mast as to their business relations, or as to the latter's interest in the hotel. This new evidence then was material, and, so far as we know, not cumulative; but appellants "by the exercise of reasonable diligence could have discovered and produced it at the trial." The action of the court in refusing to grant appellants a new trial on the ground of *newly discovered evidence* was entirely correct.

Finally, appellants insist that the decree rendered is not supported by the pleadings. We think differently. Without an examination of the evidence, we cannot say that either appellants or appellees were entitled to liens, much less determine their order. Every reasonable presumption must be indulged in support of the correctness of the decree; and unless it *certainly* appears that no such decree as rendered could lawfully be pronounced on the pleadings, it will not be disturbed. The decree of the district court is therefore in all things

AFFIRMED.

THE other commissioners concur.

NELSON WESTOVER ET AL V. HENRY E. LEWIS.

FILED APRIL 11, 1893. No. 4326.

1. **Finding in Case Tried to Court: REVIEW.** The finding of a court, in a case tried without the intervention of a jury, has the same force as a verdict and will not be disturbed where the evidence is conflicting.
2. **Dismissal.** Where testimony has been introduced justifying the granting of any relief, and in support of any issue, the court cannot dismiss the action because of a failure of proof upon other issues.
3. **Finding in Support of Temporary Injunction: REVIEW.** A judgment containing a finding that a temporary injunction was properly allowed will not be reversed where such finding does not prejudicially affect the rights of the party complaining, and the judgment is otherwise correct.

ERROR from the district court of Lancaster county.
Tried below before FIELD, J.

Billingsley & Woodward, J. E. Philpott, and W. H. Westover, for plaintiffs in error.

Henry E. Lewis, Frank W. Lewis, and Robert Ryan, contra.

IRVINE, C.

This is a proceeding in error seeking to reverse a judgment of the district court of Lancaster county entered in two cases which had been consolidated and tried together. One of these cases was brought by the defendant in error against Nelson Westover, John Fisher, A. H. Westover, and Jennie Westover, upon a bond executed by Nelson Westover as principal, and the other defendants named as sureties, which bond recites an agreement between Nelson Westover and Lewis, contemplating the sale by Westover to

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Lewis within a period of two years from the date of the bond and agreement, of promissory notes secured by chattel mortgages or otherwise, and the indorsement of such notes to Lewis; Westover guaranteeing to Lewis and his assigns payment within thirty days after maturity of each and every of the promissory notes so sold and indorsed with interest, and agreeing to collect said notes without expense to Lewis, and agreeing that if any note should not be paid within thirty days after maturity to forthwith pay said note to Lewis or his assigns. The condition of the bond was for the payment by Westover to Lewis within thirty days after maturity of each and every of said notes so sold with interest, and generally for the performance of the contract. The petition sets up the purchase by Lewis from Westover of certain notes, the failure to pay the same, and prays judgment accordingly. The second action was brought by Lewis against Westover alone, alleging that in 1885 he placed in the hands of Westover a large number of notes theretofore purchased from Westover with the agreement on the part of Westover to collect and remit. That Westover collected a large sum on the notes, failing to remit the proceeds, and in some cases taking horses and cattle in payment of the notes, and investing the proceeds of other notes in horses and cattle, and when requested to pay over the proceeds, that he gave Lewis security on said horses and cattle through an instrument, in form a bill of sale, attached to the petition. Lewis alleges that said instrument was given to secure the payment of the money so collected, and for no other purpose. The petition in the second case further alleges that Westover was threatening and about to sell said property, declaring Lewis to be its owner, and claiming the right to sell the same to pay costs of keeping said stock, and bringing from Boone county to Lancaster county; further, that there was a large amount of money due to Lewis from Westover secured by said instrument. The petition prays that Westover be enjoined

from selling and disposing of said stock; that an accounting be had, and the property sold and proceeds applied to the payment of the amount found due the plaintiff.

In this second action an injunction seems to have been granted *pendente lite*. Subsequently the defendant moved to modify the injunction so as to allow him to sell the property and bring the proceeds into court, subject to its further order. Thereupon an order was made directing the property to be sold by the sheriff and the proceeds brought into court; this was done. Thereafter John Fisher and Jennie Westover intervened in this action by a petition setting up an agister's lien upon the stock. It is unnecessary for the purposes of this decision to state the nature of the other pleadings in the two cases, except to say that by appropriate pleadings the whole subject-matter of the actions was substantially put in issue, except that the agreement and bond alleged in the first petition was admitted, and that in the second case Nelson Westover by answer alleged that the bill of sale referred to was in pursuance of an absolute sale of the stock in question to Lewis and was not given as security.

Upon the trial of the case the court found due Lewis from Westover \$3,054.65, and the same amount due from John Fisher and A. H. Westover as sureties upon the bond. The court further found in favor of the defendant Jennie Westover, upon the defense of coverture set up by her, and dismissed the action as against her. The court further found that the injunction had been properly allowed; that Nelson Westover was the owner of the stock, subject to a lien of Lewis by virtue of said bill of sale for any indebtedness existing, and that Lewis was entitled to the proceeds of the sale of the cattle then in the hands of the clerk. Judgment was rendered accordingly.

The assignments of error are quite general in their terms, and for the most part raise no questions except as to the sufficiency of the evidence. The principal conten-

tion is against the finding of the court whereby the transfer of the stock from Nelson Westover to Lewis was declared to be a mortgage. Another assignment relates to the finding of the amount due. Upon these questions the briefs are voluminous, and the testimony relating thereto, preserved in the bill of exceptions, is of very considerable bulk. It would serve no useful purpose to expand this opinion by a review of the evidence. This court, in the exercise of its appellate jurisdiction, is not a court for the determination of issues of fact where the evidence is conflicting. A careful examination has been made of the record, and it very clearly discloses sufficient evidence to sustain the findings of the trial court in both particulars. It is indeed admitted in the brief of plaintiff in error that Lewis's testimony shows the transfer of stock to be a mortgage. The testimony offered on his behalf, as to the amount of indebtedness, is as clearly sufficient upon that point.

It is also contended that the court erred in overruling a motion made when Lewis rested his case in chief; that the equity branch of the case should be dismissed for the reason that no evidence had been offered in support thereof. The argument upon this point is directed to the fact that all the evidence offered at that time had related to the indebtedness from Westover to Lewis, and that no evidence had been offered to sustain the allegations as to Westover's threatening to dispose of the live stock. The object of the equity case was not, however, merely to obtain the injunction. It sought an accounting and a foreclosure of the instrument claimed by Lewis, and found by the court to be a chattel mortgage. The action might well have been maintained as one for an accounting alone. The first action was one at law upon the bond. The second was for an accounting upon an indebtedness arising in the same manner, but to enforce different security. The plaintiff had a right to maintain both actions, and the testimony offered by him

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in chief tended to support both cases. There was, therefore, no error in overruling this motion. Indeed, it may be doubted whether error can be predicated in any case upon such a ruling where the party moving for a dismissal, instead of resting upon his motion, proceeds to introduce evidence, and the whole evidence in the case supports the cause of action.

The only other error of law specifically referred to is the finding of the court that the injunction was properly granted. If this was an error, it was without prejudice. The court found that Lewis had a mortgage upon the cattle for more than they proved to be worth. Westover had no right to sell them, and furthermore, upon Westover's own motion, a sale was made under the direction of the court, and the proceeds held to await the determination of the action. We cannot see how this finding as to the right of plaintiff to an injunction at the institution of the suit in any way affects the rights of the defendants. The judgment of the district court was right and is

AFFIRMED.

RAGAN, C., concurs.

RYAN, C., took no part in the decision.

CITY OF GRAND ISLAND V. HANNAH OBERSCHULTE.

FILED APRIL 26, 1893. No. 5031.

1. **Municipal Corporations: LIABILITY FOR FAILURE TO KEEP STREETS AND SIDEWALKS IN REPAIR: INSTRUCTIONS** set out in the opinion held not calculated to mislead the jury, and that the verdict is sustained by the evidence.
2. **The verdict conforms to the proof.**

ERROR from the district court of Hall county. Tried below before HARRISON, J.

O. A. Abbott, for plaintiff in error:

The city is under no obligations to make its sidewalks *convenient*; is under no obligation to any private individual to lay down any walks. The duty imposed upon it by law to repair streets, like its duty to light them, is a duty which courts cannot enforce, although a citizen may suffer injury from the non-action of the city. (*City of Freeport v. Isabell*, 83 Ill., 442; *City of Joliet v. Verley*, 35 Id., 58; *Sparhawk v. City of Salem*, 1 Allen [Mass.], 30; *Macomber v. City of Taunton*, 100 Mass., 255.)

Thompson Bros., *contra*, cited: *City of Lincoln v. Walker*, 18 Neb., 250; *Palmer v. City of Lincoln*, 5 Id., 136; *City of Lincoln v. Smith*, 28 Id., 762; *City of Omaha v. Randolph*, 30 Id., 699.

MAXWELL, CH. J.

This is an action brought by the defendant in error against the plaintiff in error for damages caused by injuries received by her from a fall or sudden jar received while passing along the sidewalk on one of the streets in the city of Grand Island on the night of the 11th day of February, 1890. This street had been graded during the fall of 1889, and in grading the same an embankment was left on the west side thereof over or through which a person would be compelled to cross in passing from the east to west along the sidewalk on the north side of Sixth street, which excavation was perpendicular, and as shown by the evidence, was at least from one and a half to two feet deep; that there were no guards, lights, or other protection to a traveler passing along and over the said excavation; that the rain and melting snow had deepened this

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excavation so that at the time of the receiving of the said injuries the depression was at least two feet deep, and that the city had carelessly, knowingly, and negligently permitted the said street to remain in such dangerous condition; that on the night in question the defendant in error with her husband and a lady friend were passing along Sixth street, and on arriving at the said excavation the defendant in error, without knowing the bad condition of the street, stepped suddenly down in said excavation, the defendant in error receiving serious internal injuries caused by such sudden fall or jar. The night was extremely dark and there was nothing to warn the said defendant in error of the dangerous condition of the street, and she and each of her said companions being unacquainted with the street. The testimony also shows that prior to receiving the injury Hannah Oberschulte was a stout, able-bodied woman, able to do all her own work and work for other people, but from the time of receiving the said injury she was unable to work, the injury being of a permanent nature and was caused without any fault or negligence on her part. The cause was tried to a jury; verdict and judgment in favor of the said defendant in error for the sum of \$1,000.

The ground assigned for a reversal of the case is that the court erred in giving instruction No. 7, which is as follows:

"You are further instructed that if you find from the evidence that the defendant did not exercise reasonable care and supervision over that portion of the street where the injury in question was alleged to have occurred, to keep it in good and safe condition, and by that means allowed it to become defective and unsafe, and if you further believe from the evidence that the plaintiff, in attempting to walk along that portion of the street, by reason of such defect, was injured and has sustained damage thereby, as charged in the petition, and that she was at the time exercising reasonable care and caution in walking on said

street, then the defendant is liable. It is the duty of the defendant city to keep and maintain its sidewalks in good repair for the safe use and the convenient use of the traveling public walking and passing thereon; and if the city authorities, knowing that said street is defective and unsafe, or after having sufficient time in exercising of reasonable diligence or ordinary care to discover and repair the defect complained of, suffers it to remain in an unsafe condition, and if the plaintiff, while lawfully and in the exercise of ordinary care, passed over the said street in such unsafe condition, and was injured by reason of the defective condition of the said street, then the city is liable for her damages sustained at the time of such accident."

The objection in the plaintiff in error's brief is "that the city is under no obligations to make its sidewalks convenient." The first definition of "convenient" given by Webster is, "fit or adapted to an end; suitable; becoming; appropriate." Fit or suitable is probably the proper meaning as applied to a sidewalk. This does not necessarily apply to any particular material out of which it is to be constructed, but it must be placed in such condition that people in the exercise of ordinary care will not in the night season fall into an excavation or place left in a dangerous condition. It is evident that the instruction in question did not mislead the jury, and the verdict conforms to the proof. The judgment is therefore

AFFIRMED.

THE other judges concur.

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56 299

**JOSIE JOHNSON, APPELLANT, v. JONAS P. JOHNSON,
ADMINISTRATOR, APPELLEE.**

FILED APRIL 26, 1893. No. 5046.

1. **Creditor's Bill: GIFT: LIABILITY OF THIRD PARTY: EVIDENCE.** The testimony tends to show that in 1882, one C., then worth at least \$5,000, erected a house and made improvements on the land of his mother, which cost to exceed \$2,000. He continued to assist her in a limited degree until 1886, when he died insolvent. In an action by a creditor whose claim had nearly all been contracted after 1882, and who received payment of her share of the assets of the estate of C. *pro rata* with other creditors, to subject the estate of the mother to the payment of the residue of her claim, *held*, that the proof failed to show that C. was insolvent when he assisted his mother, or that his assisting her caused his insolvency, and that the mother's estate was not liable.
2. ———: **EVIDENCE.** There is proof that would warrant the court in finding that his mother, about 1880, loaned C. \$1,050.

APPEAL from the district court of Howard county.
Heard below before COFFIN, J.

O. A. Abbott and A. A. Kendall, for appellant.

Paul & Templin, *contra*.

MAXWELL, CH. J.

This is an action to subject certain real estate to the payment of the claims of the plaintiff. The testimony shows that Chris Johnson died in the year 1886; at that time he was indebted to the plaintiff in the sum of \$922.50, which was allowed against his estate. The estate proved to be insolvent, and the plaintiff only received the sum of \$577.31, leaving due to her on said claim \$453.60, for which it is sought to subject the real estate in question. On the trial of the cause in the court below the issues were found in favor of the defendant and the action dismissed.

The testimony tends to show that one Sarah C. Johnson, the mother of Chris Johnson and Jonas P. Johnson, removed to this state about the year 1881 and settled upon government land, and that Jonas P. Johnson had removed to this state one or two years before that time; that his mother's claim was near his; that Chris Johnson, who had been doing business in Illinois, commenced the erection of a house and other improvements on the land for his mother; that the value of the house and other improvements exceeded \$2,000; that the house and improvements were made in 1882 and 1883. There is some proof, however, that Chris continued in a limited degree to assist his mother up to the time of his death in 1886. There is also proof tending to show that prior to 1880 Chris had been conducting a grocery and failed in business; that afterwards he obtained \$1,050 from his mother and started a saloon in Quincy, Illinois. In this he succeeded and sold out in 1882 for \$5,000.

The plaintiff's claim is for service and for keeping house for Chris, which began about 1882 and continued up to the time of his death. She claims that Chris put his money into the estate of his mother and thereby became insolvent; that the mother's estate is liable for her claim. The proof fails to show that Chris Johnson was insolvent when he made the improvements in question for his mother, or that he made the improvements in contemplation of insolvency. A person who is apparently able to pay his debts and believes himself to be so, and has no design to defraud his creditors, may make a valid gift to a relative. The gift, however, must not be disproportionate to his means, nor such as will produce insolvency. The proof fails to show that this gift, if such it was, produced the insolvency of Chris Johnson. The proof is meager upon this point and very unsatisfactory. The right of the plaintiff to reach the assets in the hands of a fraudulent grantee is undoubted, but the proof fails to sustain the charge. This is

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upon the theory that Chris made a gift of the house and improvements to his mother, but, as heretofore stated, the court would be justified in finding that Chris was indebted to her for \$1,050. In any view of the case, therefore, the judgment is right and is

AFFIRMED.

THE other judges concur.

36	702
41	243

GEORGE BEDFORD V. STATE OF NEBRASKA.

FILED APRIL 26, 1893. NO. 4978.

1. **Criminal Law: ADMISSION OF INCOMPETENT EVIDENCE:**
ERROR NOT CURED BY ORDER TO STRIKE OUT. In a criminal prosecution, evidence which on its face is clearly incompetent and prejudicial to the accused should not be introduced, and if the prosecution, without a promise to prove other facts to render it competent, is permitted to introduce such evidence and it is thus placed before the jury, an order of the court afterwards made to strike it out does not wholly cure the wrong and may be cause for reversing the judgment.
2. **Letters written by third parties in another state to third parties in this, but not in answer to letters written by the accused nor connected therewith, are not admissible in evidence against the accused to prove a material fact in the case.**

ERROR to the district court for Hall county. Tried below before HARRISON, J.

W. A. Prince, for plaintiff in error.

George H. Hastings, Attorney General, for the state.

MAXWELL, CH. J.

The plaintiff in error was informed against under section 164 of the Criminal Code, upon the charge that "On

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the 14th day of May, 1891, in the county of Hall and the state of Nebraska aforesaid, did then and there unlawfully, willfully, and maliciously attempt to corrupt and influence one Clara Bedford a material and important witness in an action pending in the district court of Hall county, Nebraska, wherein the state of Nebraska was plaintiff and one Hezekiah Bedford, defendant, charged with incest committed with his daughter, the said Clara Bedford, in said county, and she, the said Clara Bedford, was a material and important witness for the state of Nebraska in said case against the said Hezekiah Bedford, as he, the said George Bedford, then and there well knew. And he, the said George Bedford, did in said county and state then and there attempt to corrupt and influence the said Clara Bedford, witness as aforesaid, by offering to buy her clothes, pay her traveling expenses to the state of Illinois, and to keep her there if she, the said Clara Bedford, would leave the said county of Hall and state of Nebraska and go to the state of Illinois and secrete herself so she could not be procured as a witness on the part of the state of Nebraska in the said action against the said Hezekiah Bedford, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Nebraska." The plaintiff in error, defendant below, pleaded not guilty, whereupon a jury was impaneled and he was found guilty as charged, and sentenced to imprisonment in the county jail for seven days and to pay a fine of \$50 and costs.

Three errors are assigned which will be noticed in their order.

1. The testimony tends to show that on the 30th day of December, 1890, one Clara Bedford, a girl fourteen years of age, filed a complaint before a justice of the peace of Hall county in which she charged her father, Hezekiah Bedford, with the crime of incest; that an examination was had on the charge and the justice found probable cause

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to hold the accused to answer to the district court; that thereupon the bail was fixed at \$500, which the accused was unable to furnish, and he was therefore imprisoned in the jail of Hall county. It also appears that Hezekiah Bedford is very poor and that upon his imprisonment, if not before, his family received aid from Hall county. It also appears that the plaintiff in error is a resident of Decatur county, Illinois, and appears to be in prosperous circumstances; that he owned one or more farms about nine miles northwest of Grand Island, near Abbott station, and Hezekiah Bedford and his family resided on one of his farms. It also appears that the plaintiff in error had, before the difficulty spoken of, assisted his brother's family in a limited degree by providing clothing for them; that in the spring of 1891 he came to this state to look after his farms and perhaps assist his brother, although the proof upon that point is very meager. It does appear, however, that his brother was then in jail; that the family had been receiving aid from the county; that he carried some clothing to the house for the younger children, but that he carried the complaining witness to Grand Island, as he alleges, that she might procure some clothing for herself. He admits having taken her to a certain store (naming it) to procure certain needed articles of clothing for which he was to pay. This girl appears to be the oldest child, and the reason he gives for not taking clothing for her to the house is, in effect, that it was difficult to procure the proper size. No one seems to have seen Clara Bedford leave Grand Island, although, as will presently be seen, parties were watching the trains to see that she did not leave. The plaintiff in error seems to have expressed considerable anxiety about his brother, and had a conversation with several persons in regard to the same, among others Daniel Ramsa, called as a witness on behalf of the state, and after testifying to various conversations he had with the plaintiff in error he was permitted to testify as follows against the objections of the plaintiff in error:

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Q. Dan, do you remember coming to my (the prosecuting officer's) room one morning early, about 5 or 6 o'clock and telling me to watch the trains, that George Bedford was going to run the girl out of the country?

Objected to, as immaterial, calling for a conclusion of the witness, and for the further reason that there is no proper foundation laid. Overruled and exception taken.

Q. Can you remember doing that—yes or no; can you remember?

A. It was later than that.

Q. I want to know if you can remember that occurrence?

A. Yes.

Q. You remember that occurrence?

A. I don't remember stating it just like that.

Q. You remember coming to my room that morning?

A. Yes, sir.

Q. When was that in relation to the conversation you had with George Bedford at Whitney's stairs; before or after?

Objected to, as immaterial. Overruled and exceptions taken.

A. Mr. Ryan had notified me that they were attempting to run the girl out of the country, trying to do so, and he wanted me to—if I knew anything about it, found out anything about it at all—to let him know; and I merely mistrusted that evening from my conversation with Mr. Bedford—

Objected to, as immaterial. Overruled and exceptions taken.

A. I went and told Mr. Ryan that I thought—

Objected to, as immaterial.

A. That I thought that they was going to. I didn't know for certain, but I thought they were going to. If they hadn't, I thought they would that day.

Q. Who do you mean by "they"?

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Objected to, as calling for an opinion of the witness and no foundation laid. Overruled and exceptions taken.

A. Mr. Bedford's folks.

Q. What Bedford's folks?

A. Well, Mr. George Bedford and family up there, I suppose.

Q. Now, Dan, what county and state did these conversations that you have just related take place in?

A. This county, Grand Island, Hall county, Nebraska.

CROSS-EXAMINATION.

Q. You expected to be a witness in the case of the state of Nebraska against Hezekiah Bedford, didn't you?

A. I did.

Q. And have you ever told Mr. Bedford and myself that you didn't think there was any case there?

A. I might have said so.

Q. You told us that you thought you could bring evidence that would acquit Mr. Hezekiah Bedford, didn't you?

A. I have said lots of times, and would say it now, that I think there can be evidence fetched to impeach what evidence has been given.

Q. And that you thought——

COURT: This part of Mr. Ramsa's testimony with regard to his going and telling Mr. Ryan, unless there is some further foundation for it than has been given, may be stricken out.

We know of no rule that will permit the admission of evidence plainly incompetent on its face over the objection of the party accused where there is no promise by the party offering it to connect with other evidence so as to render it competent; and after it is before the jury strike it out. The court may be deceived as to the effect of certain evidence offered, or may believe that it is properly admissible, and after it is before the jury see that it is not, and therefore order it stricken out; but a court cannot deliberately permit a large amount of damaging evidence to be

admitted and have its effect on the jury and then cure the wrong by merely striking out the testimony improperly received. The state should not resort to questionable practices to secure conviction. Constitutional guarantees of a fair trial before an impartial jury amount to but little if tricks are sanctioned in the progress of a trial. It is very evident that merely withdrawing the evidence from the jury did not remedy the wrong.

2. A letter from the wife of the plaintiff in error to the wife of Hezekiah Bedford, and also from the daughter to her mother, were offered and introduced in evidence against the objection of the plaintiff in error. These letters were not written to the plaintiff in error, nor in answer to letters sent by him, nor are they in any way connected with this case. Upon what theory they were admitted we are at a loss to know. Letters of third persons are receivable in evidence as merely collateral, introductory, or incidental to or in illustration of the testimony which the witness gives. (1 Chitty, Cr. Law, 368, 369; 1 Phillips, Ev. [4th Am. ed.], 170.) As, where a witness testified that he was induced to institute proceedings by letters of a third party. (*Lewis v. Manly*, 2 Yeates [Pa.], 200.) But the letters could not be received as evidence of the facts stated in them. (5 Am. Law Reg., 468.) "All acts, declarations, etc., made by third persons are obnoxious to two objections. 1. That they are *res inter alios acta*, and therefore irrelevant. 2. That they are mere hearsay, the assertions of parties without the sanction of an oath and an opportunity for cross-examination. But entries against interest and in the course of business have always been considered as limitations of the rule excluding the first, and they are admitted not because the acts or admissions of third parties can bind others, but because they are evidence, just as the same party's oath would be, of the facts therein stated. The peculiar circumstances under which they are made are considered quite as efficient a safeguard against falsehood as an oath, and

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when the opportunity for cross-examination is forever lost by the party's death, such entries and declarations are freely admitted in evidence in suits between other parties." Letters of third parties in a foreign country in the ordinary course of business offering to sell goods of a certain grade for a price named have been received in evidence. (*In re Fennerstein's Champagne*, 5 Am. Law Reg., 464, and cases cited.) The case cited was decided by a divided court—three of the judges dissenting. No case has been cited, however, and we have been unable, after a pretty thorough search to find one, where letters of third parties addressed to third parties, and having no connection with the accused, were admissible in evidence to prove an essential fact in the prosecution of the case. It is very evident that these letters were improperly admitted and that the court erred in its ruling thereon.

3. As there must be a new trial we will not discuss the evidence. It rests largely in inferences. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

36 708
153 133

**WOOD RIVER BANK OF WOOD RIVER V. FREEMAN C.
DODGE ET AL.**

FILED APRIL 26, 1893. No. 4674.

1. **Review.** Where from an examination of the evidence it is apparent that the verdict is wrong, it will be set aside.
2. **Misconduct of Juror: STATEMENT OF FACTS WHILE CONSIDERING VERDICT.** A juror will not be permitted to state to his fellow-jurors, while they are considering their verdict, facts

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in the case within his own personal knowledge but not given in evidence. He should make the same known during the trial and, if desired, testify as a witness in the case.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

J. H. Woolley and Thompson Bros., for plaintiff in error.

Thummel & Platt, contra.

MAXWELL, CH J.

The plaintiff brought an action against the defendants to recover the sum of \$1,884.25 with interest. To the petition the defendants filed an answer as follows:

"Come now the above defendants and for answer to the petition of plaintiff say, that they formed a limited partnership in the transaction of purchasing and selling hogs and conducted said business in the name of Dodge Bros.; that they kept the account with the said plaintiff in all the transactions done, and banked with this plaintiff as Dodge Bros. for this business; that Freeman C. Dodge had a personal account with said bank, so did the said George F. Dodge, for their own personal transaction of business which had no connection whatever with the said Dodge Bros.' business; that these defendants made all deposits done under the business in the name of Dodge Bros., and drew on the said plaintiff all the checks on the said plaintiff's bank in the name of Dodge Bros., and none other; that George F. Dodge did all the business transactions for the said firm and deposited all the funds for the sale of the property and drew all the checks and money from the plaintiff in the name of Dodge Bros., and none other; that these defendants admit they drew from the said plaintiff the said sum of \$21,993.21, and no more; they also admit they deposited the sum of \$20,108.96, as credited to

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them in the petition, and also claim the fact to be that they paid or deposited the additional sum of \$7,832.47 to the said plaintiff, which the said plaintiff has neglected and refused to give them credit for as follows: On or about June 30, 1887, the United States National Bank deposited or paid to the plaintiff, to be placed to the credit of Dodge Bros., the sum of \$5,812.89; that on the 18th day of July, 1887, the said Dodge Bros. deposited or paid into plaintiff's bank, to be credited to the said Dodge Bros., the sum of \$600, on September 5, \$789.23, and September 9, \$629.65; that the said defendants are not indebted to said plaintiff in any sum whatever, but that the plaintiff was indebted at the commencement of this action on the said account the sum of \$5,812.89, which sum the defendants claim justly due and wholly unpaid; therefore pray judgment against said plaintiff in the said sum of \$5,812.89 over and above all claims so as aforesaid mentioned in plaintiff's petition, with interest thereon at seven per cent per annum from the 18th day of January, 1888, and costs."

The plaintiff filed the following reply:

"Now comes the above named plaintiff and for reply states: That it denies that the said defendants, or either of them, are entitled to the credit of \$7,012.89, the same being the \$5,812.89 and \$1,200, mentioned in said defendants' answer, or any other or different amount than as mentioned in the said plaintiff's petition, or that the said plaintiff received the said amounts, or either of them, except in said petition mentioned and herein stated, and as further reply states that the \$5,812.89 was received by the said plaintiff in draft in favor of said Dodge Bros. at the time in said answer mentioned, but that the same was claimed by the said Freeman C. Dodge to be his property or mostly so, and the said Freeman C. Dodge then and there ordered the same placed to his credit on his individual account with the said bank, which the said bank then and there did; that the same was done

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by and with the knowledge and consent of the said George F. Dodge, and was afterwards by him ratified and adopted with the full knowledge of all the foregoing facts; that the plaintiff has since the said time made and effected a settlement with the said Freeman C. Dodge, and by and with the consent of the said George F. Dodge allowed and given the said Freeman C. Dodge entire and full credit for the said sum of \$5,812.89, and that neither of said defendants are entitled to the said credit of the said amount on the account sued on in this case; that as to the facts as to whether or not the said defendants are partners or were at the time the said account was made and business transacted this defendant has neither knowledge nor information sufficient to form a belief and therefore denies the same and puts said defendants upon their proof. Wherefore the said plaintiff demands judgment against the said defendants as in its petition prayed."

On the trial of the cause the jury returned a verdict for the defendants for the sum of \$4,719.71, upon which judgment was rendered.

Two errors are relied upon for a reversal of the judgment: First, that the verdict is against the weight of evidence; and, second, misconduct of certain jurors.

1. The testimony is undisputed that about the 1st of July, 1887, a large number of hogs were shipped in the name of Dodge Bros. to South Omaha; that the amount realized from these hogs was \$5,812.89, which was placed to the credit of the Wood River Bank in the United States National Bank of Omaha. Up to this point there is no dispute. It is claimed on behalf of plaintiff that the hogs in question were the property of Freeman C. Dodge and paid for by him out of money obtained from the plaintiff, and that he directed the plaintiff to place the same to the credit of his individual account, which was done. This is denied by the defendants. Both of the defendants testify that the money was deposited to the credit of Dodge Bros.,

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and not to the credit of Freeman. All the officers of the bank, some of whom seem to be disinterested, testify that such was the arrangement. We also find that in the bank book of George Dodge with the plaintiff, which is here in the record, these hogs were not credited to Dodge Bros. The officers of the bank testify that this book was delivered to George Dodge a few weeks after the transaction; that he returned and stated that he and his wife had looked over it and found it correct, except an item of \$20. George denies receiving the book until about the month of January after the transaction. He in effect admits the \$20 mistake. The mode of doing business with the bank seems to have been as follows: When a shipment of hogs was about to be made the defendants would receive credit for the supposed value of the hogs and were permitted to check the same out. It appears that about the 5th of September of that year Dodge Bros. made, or were about to make, a shipment of hogs to South Omaha and received credit at the bank for \$600, a duplicate deposit slip being made. It is claimed by the plaintiff that the same day a second duplicate deposit for \$600 was made. The defendant George Dodge testifies, in effect, that this was a second deposit and that it was received from a second shipment of hogs. On the other hand the cashier testifies that original credit was given in the morning and the duplicate slip given to the defendant; that in the afternoon he came into the bank and stated that he had not received a duplicate in the morning and that thereupon the cashier issued a second duplicate slip for \$600, and wrote the abbreviated word "dupl." instead of triplicate on it. The agent of the railroad company at Wood River was called and stated, in substance, that a record was kept in his office of all shipments made from there and but one car of hogs was shipped by Dodge Bros. at the time stated, and he in effect corroborates the testimony of the cashier. It is very evident, therefore, that Dodge is mistaken in his testimony, and

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that the cashier's testimony on that point is correct, and the verdict is against the weight of evidence.

2. The affidavit of one of the jurors was filed in support of one of the grounds of the motion for a new trial for the misconduct of certain jurors. It is as follows:

"P. F. McCullough, being first duly sworn, deposes and says that he was a member of the jury to whom the above case was tried on February 15, 1890; that during the discussion of the case in the jury room the question came up as to whether Freeman C. Dodge did authorize the Wood River Bank to place the said \$5,812.89 to his own individual credit, when Mr. Hollister and Mr. Hockenberger both swore he did so authorize, and F. C. Dodge swore he was not in Wood River, Nebraska, on July 2, 1887, the date of said credit, but was in Omaha, Nebraska; that many of the jury were in doubt as to who was mistaken on this point, and so expressed themselves; that thereupon one C. C. Robinson, a member of said jury, stated that he knew Mr. Hollister and Mr. Hockenberger were mistaken as to that point, for he was in Omaha, Nebraska, and saw the said Freeman C. Dodge there himself on July 2, 1887, and he could not have been present in Wood River, Nebraska, on that day and ordered said credit; that many of said jury, and especially this affiant, having confidence in and relying upon the statement of said C. C. Robinson, became satisfied that said Hollister and Hockenberger were mistaken on this point, and so may be mistaken on other points, and thereupon he changed his vote from the plaintiff's favor to and for a verdict for these defendants." There is also an affidavit of W. H. Thompson to the same effect. There is also an affidavit of J. H. Woolley that the jury were sent out Saturday evening; that a number of them resided in the western part of the county and were very anxious to return home; that they inquired of the bailiff the time when the last train would be due going west, and having ascertained the time, the verdict was returned

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before that hour and presumably without proper deliberation.

The counter-affidavit of Robinson is in the record as follows:

"Chan C. Robinson, being sworn, deposes and says that he was one of the panel in the case of the Wood River Bank of Nebraska against Freeman C. Dodge and George F. Dodge, which case was tried and submitted to the jury on the 15th day of February, 1890; that affiant has heard read the affidavit of P. F. McCullough filed in and attached to the motion in this case for a new trial; that the matter in said affidavit wherein said McCullough swore that this affiant said in the jury room while deliberating on their verdict that he, Freeman C. Dodge, could not have been at Wood River on the 2d day of July as he, Chan C. Robinson, saw him in Omaha on that day is wholly without foundation and untrue; that affiant did not say he saw said Dodge on the 2d day of July as aforesaid, in Omaha, all affiant did say on this subject in the deliberation of said jury was wholly in regard to the evidence introduced on the trial. Affiant further says that the jury, and each of them, so far as he knows and was informed, tried all honest means to impress others differing with them as to their views in the evidence and the instructions of the court; that after deliberating several hours on the matter they finally agreed upon their verdict brought into court and affiant did not in any way attempt (except by argument) to convince others differing with him as to what he thought was right on the evidence in the case."

It will be observed that Mr. Robinson does not make a full, unequivocal denial of the charge against him. The affidavit in fact is a skillful evasion of the matter in issue. His statement that what he said was wholly in relation to the evidence in the case, and that he did not in any way attempt, except by argument, to convince others differing from him, falls far short of a denial of the charges.

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In *Richards v. State*, 36 Neb., 18, it was held that a juror will not be permitted to state to his fellow-jurors, while they are considering their verdict, facts in the case within his own personal knowledge. He should make the same known during the trial and testify as a witness in the case. It is for the court to say what evidence is admissible in a case, and the adverse party may desire to cross-examine him. In any event it is his duty to be governed by the evidence introduced on the trial and the instructions of the court; otherwise, in case of an erroneous verdict, it would be impossible to review the same. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ALBERT B. OGDEN ET AL. V. NATHAN H. WARREN
ET AL.

FILED APRIL 26, 1893. No. 4797.

1. **Replevin:** TITLE: CONTRACT set out in the opinion construed, and held that W. & Co. had a lien upon the corn for the purchase money and their share of the profits and were entitled to immediate possession.
2. —: **DEMAND.** Where a defendant lawfully in the possession of property denies the title and right of possession of the owners no demand is necessary.
3. —: **RIGHTS OF RECEIVER IN ANOTHER STATE: PARTIES.** A receiver appointed by a court of record of another state to take charge of a business of a partnership there and to wind up its affairs may take charge of property of the firm in this state, but in such case there is a mere substitution of parties and the receiver has no greater rights in such property than the parties themselves.

36	715
48	463
36	715
57	284
36	715
59	209
36	715
61	366

ERROR from the district court of Adams county. Tried below before GASLIN, J.

Teller & Orahoad and Batty, Casto & Dungan, for plaintiffs in error.

Sedgwick & Power, contra.

MAXWELL, CH. J.

This is an action of replevin brought by Warren & Co. against Ogden and others to recover the possession of 14,996 bushels of ear corn of the value of \$5,248.60, or in case said property cannot be returned, the value of the same. In answer to the petition Robert E. Foot, one of the defendants, denies "that the plaintiffs, or either of them, were at the time of the commencement of this action, or at any time were the owners of the property set out in the complaint or petition, to-wit, about 14,996 bushels of ear corn, more or less, and being all the corn in the cribs numbered 1, 2, 3, 4, situate near the B. & M. R. R. track in the town of Brickton, in said Adams county, Nebraska; that the plaintiffs, or either of them, were at the time of the commencement of this action, or at any time were entitled to the immediate possession or possession of said above described property; that at the time of the commencement of this action, or at any time, he wrongfully detained said property from the possession of the plaintiffs, or either of them, for fifteen days, or for any time; that plaintiffs, or either of them, have been damaged in the sum of \$500, or any sum whatever; that on the 10th day of May, 1890, the district court of the state of Colorado, sitting in and for the county of Arapahoe, the same being a court of record and duly established under the laws of said state, entered of record in said court on said day, the same being one of the judicial days of the April term, 1890, thereof, a decree in the suit of one Albert B. Ogden,

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plaintiff, against Lorin Butterfield, defendant, wherein and whereby among other things it was adjudged and decreed by said court that the plaintiff and defendant in said action had been partners in business under the firm name of L. Butterfield & Co., and that said partnership from and after said date was dissolved; and further did adjudge and decree that this defendant, Robert E. Foot, be and he was appointed by said decree receiver of the partnership, stock, premises, outstanding debts, and effects thereof, and did duly qualify as such receiver; that the defendant Robert E. Foot, as he was in duty bound as such receiver, did enter upon his duties and take into his possession all the property of the said firm of L. Butterfield & Co., and did, on or about the 12th day of May, 1890, in the town of Brickton, in the county of Adams, in the state of Nebraska, find in the lawful possession of L. Butterfield & Co. the property mentioned herein and in said petition, and did then and there take possession of said property and was, as such receiver, in the peaceful, quiet, and lawful possession thereof at the time of the commencement of this action, and entitled at all times to retain possession thereof and protect said possession in the discharge of his duties as such receiver; that said property was in the possession of L. Butterfield & Co., as aforesaid, under and by virtue of a contract in writing, wherein and whereby the plaintiffs and said L. Butterfield & Co. owned said property in common, and passed to this defendant as receiver as aforesaid; that the defendants F. H. Felt and C. J. Barnes were acting under instructions of this defendant, as receiver aforesaid, in maintaining and protecting said possession at the time of the commencement of this action. Wherefore defendant prays that this action may be dismissed at plaintiffs' cost and that he be decreed entitled to the return of said property as such receiver, and upon the failure of plaintiffs to return the same that he may have judgment for the full value thereof."

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Albert B. Ogden, one of the defendants, filed an answer in which he denies that Warren & Co., or either of them, at the commencement of the action, was the owner of the property or entitled to the possession thereof, or that the property was wrongfully detained from said party. He also alleges the dissolution of the firm of L. Butterfield & Co. and the appointment of Foot as receiver, and that the acts done by the defendants below were to protect the possession of the receiver against the unlawful attempts of the plaintiffs below forcibly to take possession of the corn.

Warren & Co. in their reply in effect deny all the facts in the foregoing answers.

On the trial of the cause the jury found that Warren & Co. were, at the commencement of the action, the owners of and entitled to the immediate possession of the corn, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The corn was purchased under the following agreement :

"Memorandum of agreement, made this 6th day of November, 1889, between Nathan H., Cyrus I., and Chas. C. Warren, composing the firm of N. H. Warren & Co., of Chicago, Illinois, party of the first part, and L. Butterfield & Co., of Denver, Colorado, party of the second part, witnesseth : The party of the second part agrees to buy and store in cribs belonging to them at Inland, Saronville, and Brickton, Nebraska, ear corn to the amount of 50,000 bushels, more or less, and to pay the expense of cribbing, insurance, shelling, and other necessary expenses, to the time of shipment of said corn. The party of the second part further agrees to put a sign bearing the name of the first party (N. H. Warren & Co.), on each crib of 5,000 bushels, and to shell and ship said corn only by and under the direction of said first party. They also agree to furnish the use of said cribs free of charge—it being understood that the meaning of their contract is that the party of the first part shall furnish the money free of interest to

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pay for the corn, and the party of the second part shall furnish the cribs and labor, and expense of buying, cribbing, shelling, preparing for market, if needed, loading on the cars, and insuring the corn, which is to be the property of N. H. Warren & Co., and at all times under their control and direction. Furthermore, that all profits and losses arising from the handling and sale of the corn are to be equally divided between the parties of the first and second part after the parties of the first part have received the amount furnished to pay for the corn without interest. It is further agreed that the party of the second part shall furnish crib receipts.

(Signed)

N. H. WARREN & Co.

"L. BUTTERFIELD & Co."

It will be observed that Warren & Co. were to furnish the money to purchase the corn and Butterfield & Co. were to purchase the same, place it in cribs, insure it, and incur all lawful expenses of buying, cribbing, shelling, and preparing for market. It is provided, however, that the corn was to be the property of Warren & Co. at all times under their control. The profits above the actual cost of the corn and expenses were to be equally divided. A fair construction of this contract gave Warren & Co. a lien upon the corn for the purchase money and one-half of the profits. To that extent, without doubt, they were the owners and entitled to the possession. Had the answer of Foot been of such a character as to show the exact interest of Butterfield & Co. in the corn in dispute, it is probable that the whole controversy might have been adjusted in this action. The answer, however, simply puts in issue the rights of Warren & Co. to either the title or possession of the property. Therefore it will be necessary for the receiver to bring an action against Warren & Co.

The defendant in error insists that the receiver has no jurisdiction in this state, having been appointed by a district court in Colorado. We think differently, however,

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but he simply steps into the shoes of Butterfield & Co., and has no greater rights than they possessed.

The plaintiffs in error contend that there was no demand before bringing the suit, and therefore replevin will not lie. In their answer, however, they deny the right and title of Warren & Co., and claim that they are in the receiver. In such case no demand is necessary. (*Homan v. Laboo*, 1 Neb., 204.) Upon the whole case it is apparent that the judgment is right and it is

AFFIRMED.

THE other judges concur.

JOHN F. WHIPPLE V. PAULINA A. HILL.

FILED APRIL 26, 1893. No. 4876.

1. **Affidavit for Attachment.** The affidavit upon which the attachment in this case was issued examined, and *held* sufficient.
2. **Attachment: MOTION TO DISCHARGE: REVIEW OF ORDER MADE UPON CONFLICTING AFFIDAVITS.** Where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence.
3. **Attachment on Claim Past Due: VALIDITY OF ORDER ISSUED ON HOLIDAY: MINISTERIAL ACT.** Section 38, chapter 19, Compiled Statutes, providing that "no court can be opened nor any judicial business be transacted on Sunday, or any legal holiday," etc., does not prohibit a county judge from issuing, on a legal holiday, an order of attachment on a debt past due, since that is purely a ministerial, and not a judicial act.

ERROR from the district court of Greeley county. Tried below before COFFIN, J.

Henry Nunn, for plaintiff in error.

36	720
38	523
36	720
148	209
36	720
49	606

T. J. Doyle, contra:

The issuance of an order of attachment is a ministerial duty and not prohibited on legal holidays by statute. (*Place v. Taylor*, 22 O. St., 322; *In re Worthington*, 7 Biss. [U. S.], 455; *Glenn v. Eddy*, 17 Atl. Rep. [N. J.], 145; *Weil v. Geier*, 21 N. W. Rep. [Wis.], 246; *Smith v. Ihling*, 11 Id. [Mich.], 408; *Spaulding v. Bernhard*, 44 Id. [Wis.], 643; *Green v. Walker*, 41 Id. [Wis.], 534; *Johnson v. Day*, 17 Pick. [Mass.], 109; 29 Am. Law Reg., p. 140, and cases cited.)

NORVAL, J.

The defendant in error commenced an action by attachment in the county court of Greeley county against plaintiff in error to recover the sum of \$205.95 on a promissory note. The affidavit for the attachment was filed and the writ issued on the 1st day of September, 1890. Service was had on the following day. Subsequently defendant filed a motion in the county court to discharge the attachment upon the following grounds:

1. Because the allegations in plaintiff's affidavit are insufficient to sustain the attachment.
2. Because the allegations in said affidavit are untrue.
3. Because the writ of attachment was issued and served on the 1st day of September, 1890, which was a legal holiday.

This motion was overruled by the county court, and the attachment sustained. Thereupon the defendant prosecuted error to the district court to reverse said ruling, which resulted in affirming the decision of the county court.

The objections urged by the plaintiff in error, in his motion for a dissolution of the attachment, will be noticed in the order in which they are stated therein.

The first point made is that the allegations in the attachment affidavit are insufficient to sustain the attach-

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ment. The following is a copy of the affidavit upon which the attachment was granted, omitting caption and title of the cause:

"STATE OF NEBRASKA, }
GREELEY COUNTY. } ss.

"Henry A. Hill, being first duly sworn, says he is the duly authorized agent of plaintiff; the said plaintiff makes oath that the claim in this action is for two hundred and five and $\frac{25}{100}$ dollars, due under contract on promissory notes. And the said Henry A. Hill also makes oath that said claim is just and that Paulina A. Hill, plaintiff, ought, as he believes, to recover thereon two hundred and five $\frac{25}{100}$ dollars. He also makes oath that said defendant, John F. Whipple, is about to remove his property, or a part thereof, out of the jurisdiction of the court with the intent to defraud his creditors, and is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; that the said John F. Whipple has property and rights in action which he conceals, and has assigned, removed, and disposed of, and is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors; and fraudulently contracted the debt for which suit is brought.

"H. A. HILL.

"Subscribed in my presence and sworn to before me, this 1st day of September, A. D. 1890.

"N. H. PARKS,

"County Judge."

It is contended that the affidavit is insufficient, because the allegation therein as to plaintiff's claim is not sworn to either by the plaintiff or her agent. The objection is not good. True, the affidavit states "the said plaintiff makes oath that the claim in this action is for two hundred and five and $\frac{25}{100}$ dollars due under a contract on promissory notes." But immediately following said averment the affidavit contains this language: "And the said Henry A.

Whipple v. Hill.

Hill also makes oath that said claim is just, and that Paulina A. Hill, plaintiff, ought, as he believes, to recover thereon two hundred and five and $\frac{25}{100}$ dollars," from which it sufficiently appears that the affiant, H. A. Hill, makes oath to the statement in the affidavit relating to the nature of the plaintiff's claim. A printed form was used in preparing the affidavit, and, manifestly, it was an oversight on the part of the draftsman in not erasing the printed word "plaintiff" and inserting the word "affiant." But the affidavit is not for that reason defective. We think it sufficient to support the attachment.

In *Jansen & Co. v. Mundt*, 20 Neb., 320, an affidavit for an attachment was made by plaintiffs' attorney, wherein he swears "that he is the authorized attorney of the plaintiffs in the above entitled action; that he has commenced an action," etc. It was ruled that the defect in omitting to state that plaintiffs commenced the action did not render the affidavit void, inasmuch as it appeared from the whole affidavit that the suit was brought by the plaintiffs. In principle, the case at bar is not distinguishable from the case cited.

The second objection is that the facts stated in the affidavit for the attachment are untrue. The defendant filed an affidavit denying the grounds of the attachment, and on the hearing of the motion to dissolve, numerous affidavits were filed in support of, and in resistance of, said motion. From an examination of the several affidavits it appears that there is a sharp conflict of evidence, but we are convinced that a preponderance thereof supports the original affidavit for the attachment. The rule long adhered to in this court is, that where a motion to discharge an attachment, on the ground that the allegations in the affidavits are not true, is decided upon conflicting testimony, this court will not disturb the ruling unless the preponderance of the evidence against it is clear and decisive. (*Mayer v. Zingre*, 18 Neb., 458; *Grimes v. Farrington*, 19 Id., 44;

Holland v. Commercial Bank, 22 Id., 571; *Johnson v. Steele*, 23 Id., 82.)

The remaining question to be considered is whether or not the attachment is void, because the order was issued on a legal holiday. The solution of the question necessitates an examination of two sections of the statutes.

By section 9, chapter 41, Compiled Statutes, it is provided that "the first Monday in the month of September in each year shall hereafter be known as 'Labor Day' and shall be deemed a public holiday, in like manner and to the same extent as holidays provided for in section eight (8) of chapter forty-one (41) of the Compiled Statutes of 1887." A reference to the calendar will disclose that the first day of September, 1890, on which date the attachment in question was issued, was Monday; therefore, under the foregoing provision, was a public or legal holiday. The objection to the issuance of the writ of attachment in this case on Labor Day is based upon section 38, chapter 19, of the Compiled Statutes, which declares that "No court can be opened, nor can any judicial business be transacted, on Sunday, or any legal holiday, except—1st. To give instructions to a jury then deliberating on their verdict. 2d. To receive a verdict or discharge a jury. 3d. To exercise the powers of a single magistrate in a criminal proceeding. 4th. To grant or refuse a temporary injunction or restraining order." The legislature, by the section quoted, has prohibited the courts of the state from being opened and from the transaction of any judicial business, with certain well-defined exceptions, on any day declared by statute to be a public or legal holiday.

It will be observed that the prohibition of the statute, so far as the transaction of business on holidays is concerned, relates to acts which in their nature are purely judicial, and does not apply to such as are merely ministerial. The language of the section is plain and unambiguous, and should not be extended by judicial interpretation beyond

Whipple v. Hill.

the plain import of the words used. Had the legislature intended to debar courts, or court officers, from performing ministerial acts upon holidays, words suitable to express such an intention would have been employed. If the transaction of all legal business was forbidden on such days, as is the case in some of the states, we would grant that the order in question would be void; but the statute fails to so provide. It is the opening of courts and the transaction of judicial business on legal holidays which the law forbids. This intent is clearly manifest. We search in vain for any words which indicate a different purpose. The issuance or service of legal process, such as a summons, execution, or writ of attachment, is merely a ministerial act, and therefore is not within the inhibition of the above section of the statute, and is valid, although done on a legal holiday. (*Glenn v. Eddy*, 17 Atl. Rep. [N. J.], 145; *Kinney v. Emery*, 37 N. J. Eq., 339; *In re Worthington*, 7 Biss. [U. S.], 455; *Weil v. Geier*, 61 Wis., 414; *Smith v. Ihling*, 47 Mich., 614; *Hadley v. Musselman*, 104 Ind., 459; *Whitney v. Blackburn*, 17 Ore., 564.)

The supreme court of New Jersey in *Glenn v. Eddy*, *supra*, under a statute quite similar to our own, held that a summons might be legally issued and served on the day of a general election, which day is by law made a legal holiday. Magie, J., in delivering the opinion of the court, says: "When the statute declares them to be legal holidays it does not permit a reference to the legal status of Sunday to discover its meaning, for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the statute, therefore, is to free all persons, upon the days named, from compulsory labor, and from compulsory attendance upon courts as officers, suitors, or witnesses. Its true interpretation will limit the prohibition, with respect to the courts,

Whipple v. Hill.

to such actual sessions thereof as would require such attendance."

In *Weil v. Geier*, *supra*, the supreme court of Wisconsin, in construing a statute almost identical with the one under consideration, held that the issuance of a summons by a justice of the peace on a legal holiday is permissible, because a ministerial act. To the same effect is *Smith v. Ihling*, 47 Mich., 614.

We are convinced that a county judge in issuing an attachment exercises no judicial functions, and such a writ is not void because issued on a legal holiday. The conclusion reached does not conflict with the case of the *Merchants National Bank v. Jaffray*, 36 Neb., 218. It was there held that an order made by a district or county judge on a legal holiday, allowing an attachment in an action on a debt not due, is void. That decision was placed upon the ground that the granting of such an order is a judicial act. As was said by Judge POST in his opinion in that case, "when the application is made, the court or judge must determine judicially that the action is one of those contemplated by the statute, and that the showing is sufficient to entitle the plaintiff to an attachment."

The issuance of a writ of attachment on a debt past due, as already stated, is a purely ministerial act. When the proper affidavit and bond are filed, it is the imperative duty of the county judge to issue the attachment. He has no discretion in the matter. The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

JOSEPH PARRISH ET AL. V. JAMES R. MCNEAL.

FILED APRIL 26, 1893. No. 4983.

1. **Witnesses: COMPETENCY OF TESTIMONY CONCERNING TRANSACTIONS WITH DECEDENT.** A person having a direct legal interest in the result of an action in which the adverse party is an administrator of a deceased person is not precluded by section 329 of the Code from testifying to a transaction between himself and such deceased person in case such administrator has first introduced a witness who has testified in regard to the same transaction.
2. ———: ———: **EVIDENCE: WAIVER OF OBJECTION.** When a person, who is precluded by the provisions of said section from testifying against the representative of a deceased person, is permitted, without objection, to testify to a conversation or transaction had with such deceased person, it is a waiver of the benefit of the statute.
3. **Verdict: OMISSION OF ADMINISTRATOR'S NAME FROM TITLE OF CAUSE.** *Held*, The verdict is sufficient, both in form and substance.

ERROR from the district court of Pawnee county. Tried below before APPELGET, J.

J. L. Edwards, for plaintiffs in error.

J. K. Goudy and *W. W. Giffen*, *contra*.

NORVAL, J.

This action was brought by James R. McNeal against Joseph Parrish to recover for the alleged conversion of a mule. The suit was commenced in justice court. From a judgment in favor of the defendant plaintiff appealed to the district court, where, after the plaintiff had introduced his testimony in chief and a portion of the testimony for the defense had been received, on motion of the defendant, and over the objection of the plaintiff, the court permitted

36	727
39	545
36	737
46	547
36	727
48	696
36	727
50	612
36	727
59	344

Parrish v. McNeal.

G. J. Morton, administrator of the estate of Joseph B. Morton, deceased, to be made a party defendant. The jury returned a verdict for the plaintiff for the sum of \$87.50, upon which judgment was rendered. Defendants bring the case to this court for review on error.

It appears from the bill of exceptions that on the 25th day of January, 1889, James R. McNeal gave a chattel mortgage upon the mule in dispute to Joseph B. Morton, to secure the payment of a promissory note for \$60, due on the 25th day of January, 1890. Afterwards, but before the maturing of the note, the payee thereof, J. B. Morton, died. Subsequently, G. J. Morton was appointed administrator of his estate. The note and mortgage came into the hands of the administrator as a part of the assets of the estate, without any credits or other evidence of the same having been paid. The mortgage was placed in the hands of Parrish by the administrator, with instructions to take the property therein described, and sell the same. Plaintiff claims, and upon the trial he introduced evidence tending to show, that the note and mortgage had been paid to J. B. Morton in his lifetime; that the last payment was made in July or August, 1889, and that the note and mortgage were not delivered up, for the reason that the payee and mortgagee did not have them with him at the time the last payment was made. This evidence was contradicted by the defendants. It is unnecessary to give a detailed statement of the testimony. There was sufficient evidence given by disinterested witnesses, if believed by the jury, to justify them in finding that the mortgage debt had been fully paid before the property was seized.

It is urged that the trial court erred in permitting the plaintiff below, McNeal, to testify that he had paid the note in full to J. B. Morton. This testimony was objected to, at the time it was given, on the ground that the adverse party is a representative of a deceased person.

Under the provisions of section 329 of the Code a per-

son, having a direct legal interest in the result of a suit in which the adverse party is the representative of a deceased person, is precluded from testifying to any transaction or conversation had between himself and such deceased person, unless the evidence of the deceased person relating to such conversation or transaction has been taken and read on the trial by the adverse party, or unless such representative has produced a witness who has testified in regard to such transaction or conversation. This case falls within the exception of the statute. The administrator introduced evidence on the trial to show that McNeal had never paid the note. He even proved statements made by his intestate, in his lifetime, after the date of the alleged payment and not in the hearing of the plaintiff, that the note was unpaid. It was not until after such evidence had been received that the plaintiff was allowed to give the testimony complained of. It related to the identical transaction had with the deceased, which the witnesses for the administrator had testified in regard to, and was therefore competent.

The next error relied upon for a reversal is the permitting of the witness Ben Hur, who was a surety on the appeal bond given by the plaintiff in the justice court, to testify as to a conversation had by the witness with J. B. Morton, relating to plaintiff's indebtedness to him. A sufficient answer to this contention is that no objection was made in the trial court to the competency of the witness. The protection of the statute was therefore waived. (*Bartlett v. Bartlett*, 15 Neb., 593.)

Objection was made to the form of the verdict. It reads as follows:

"STATE OF NEBRASKA, } November term, A.D. 1890,
PAWNEE COUNTY. } ss. to-wit: November 15, 1890.

"JAMES R. MCNEAL, PLAINTIFF, }
v. }
JOSEPH PARRISH, DEFENDANT. }

"We, the jury in this case, being duly sworn, do find

 Rodgers v. Graham.

for the plaintiff, and assess the amount of his recovery at \$87.10.

J. W. HOIG,

"Foreman."

The only criticism upon the verdict, urged by counsel, relates to the title of the cause. No such objection was called to the attention of the court at the time the verdict was returned into court. Had it been, the defect, if any, doubtless would have been corrected before the jury were discharged. The title of the cause was not changed by permitting the administrator to appear and defend. The verdict was returned and filed in the proper action, and the title was sufficient to identify the verdict with the case. The omission of the name of the administrator as a defendant from the title was not such a defect as to prevent the entry of a judgment on the verdict. (*Morrissey v. Schindler*, 18 Neb., 672.)

Finding no error in the record, the judgment of the court below is

AFFIRMED.

THE other judges concur.

ALEXANDER RODGERS V. J. H. GRAHAM.

FILED APRIL 26, 1893. No. 4092.

1. **Replevin by Mortgagee: SUFFICIENCY OF PETITION.** The petition examined, and *held*, sufficient; also, that it is not objectionable because it fails to allege that the note, for the payment of which the mortgage set forth in the petition was given to secure, was due, since it states the date the note matured, which was prior to bringing of the suit.
2. —: **COSTS: DEMAND FOR POSSESSION.** When the defendant in an action of replevin contests the case in the trial court on the merits, wholly on an affirmative claim of ownership and

36	730
43	463
36	730
49	385
50	655
36	730
57	294
36	730
59	209
36	730
61	366

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right of possession of the property in himself, no proof of demand and refusal is necessary to entitle the plaintiff to recover costs in case the verdict is in his favor.

3. ———: USURY: COSTS. Where, in an action by a mortgagee against the mortgagor to recover the mortgaged chattels, it is established that the mortgage was given to secure a usurious loan of money, the defendant is entitled to recover costs, although the verdict is in favor of the plaintiff.

ERROR from the district court of Adams county. Tried below before GASLIN, J.

Bowen & Hoepfner, for plaintiff in error.

Capps, McCreary & Stevens, contra.

NORVAL, J.

This is an action brought by J. H. Graham in a justice court for the recovery of possession of specific personal property in the hands of Alexander Rodgers. The appraised value of the property taken under the replevin writ being in excess of \$200, the justice certified the proceedings to the district court, where the case was tried without the intervention of a jury, which resulted in a judgment in favor of the plaintiff. The defendant prosecutes error.

The first ground urged for reversal is that the petition fails to state facts sufficient to constitute a cause of action. The petition is as follows:

"The plaintiff complains of the defendant for that on the 19th day of October, 1888, the defendant made, executed, and delivered to the plaintiff a chattel mortgage in words and figures following, to-wit:

"Know all men by these presents, that Alexander Rodgers, of Adams county, Nebraska, for the consideration of five hundred and fifteen dollars, have mortgaged to J. H. Graham the following chattel property, to-wit: * * *

"This mortgage is intended to secure the payment of

Rodgers v. Graham.

one promissory note of even date herewith, made by the said Alexander Rodgers, and payable to the said J. H. Graham, or order, as follows:

“One for \$515, due the 19th day of Dec., 1888.

“And it is hereby agreed that if default be made in the payment of any part of said debt when due, or in case of an illegal removal or disposal of any of said property, then the whole sum hereby secured shall at once become due; and if default shall be made in the payment of any part of said debt when due, or if the holder thereof shall at any time feel insecure, he may take possession of said property, sell the same according to law, and apply the proceeds thereof on said debt. Such sale shall be held in ———, Nebraska, in Adams county.

“Signed this 19th day of October, 1888.

“Attest:

ALEXANDER RODGERS.

“J. A. TOWNSEND.’

“2. That no part of the debt secured by said chattel mortgage has been paid.

“3. That affiant has especial ownership in the above described property, and is entitled to the immediate possession of the same. That said goods and chattels are wrongfully detained from him by said defendant, and that said goods and chattels were not taken in execution or on any order of judgment against plaintiff, or for the payment of any tax, fine, or amercement issued against him; or by virtue of any order of delivery issued under the chapter of the Code of Civil Procedure providing for the replevin of property, or on any other *mesne* or final process issued against said plaintiff.

“Wherefore the plaintiff prays for judgment against the defendant for the possession of the said property, or, in case possession thereof cannot be had, for a judgment against the defendant for the value thereof and for the costs herein expended.”

Counsel insist that the petition does not allege any

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breach of the conditions of the mortgage, and that it does not state that the indebtedness secured by the mortgage was due. The petition charges, in effect, that the note for which the mortgage was given to secure matured on the 19th day of December, 1888, and that no part of the mortgage debt has been paid. The action was instituted on the 13th day of February, 1889, which was nearly two months after the note had matured. It was unnecessary to allege specifically in the petition a breach of the conditions in the mortgage, inasmuch as it fully appears from the facts contained in the pleading that at least one of the conditions in the mortgage had been broken, by the mortgagor making default in the payment of the note. Nor was it necessary that the petition should state specifically that the note was due, since it fully appears from the record that the same had matured long prior to the commencement of the action. The petition discloses that the plaintiff below, by the terms of his mortgage, was entitled to the immediate possession of the property in controversy when the suit was instituted, and that the defendant wrongfully withheld possession of the same; therefore the petition is sufficient.

It is urged that the judgment for costs should not have been rendered against the defendant below because no demand for possession of the property was made before the suit was commenced. The evidence establishes that a demand was made before the replevin writ was served, but after it was issued. Whether a demand for the property after the issuance of the writ is sufficient the authorities are conflicting. We are satisfied the better rule is that when the defendant refuses to surrender the property on demand of the plaintiff made after the bringing of the action, but prior to the execution of the writ, it is a good demand. It is convincing proof that had a demand been seasonably made it would have been unavailing. (*Badger v. Phinney*, 15 Mass., 359; *Grimes v. Briggs*, 110 Id.,

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446; *O'Neil v. Bailey*, 68 Me., 429.) Had the defendant surrendered the property when demand therefor was made, it would have prevented the rendering of a judgment against him for costs. This he failed to do, but contested the case through the entire trial in the lower court upon the theory that the plaintiff had no right to the property and that the defendant's possession was rightful. Such being the case, it was unnecessary to prove a demand and refusal. (*Homan v. Laboo*, 1 Neb., 209; *Aullman v. Steinar*, 8 Id., 109.)

The case of *Peters v. Parsons*, 18 Neb., 191, cited in brief of plaintiff in error, is not in conflict with the conclusion reached. It was in that case decided that an answer in an action of replevin, which is a mere general denial of the facts stated in the petition, is not a waiver of a demand for the property by the plaintiff before bringing the action. Such an answer puts in issue every fact necessary to be established by the plaintiff, including a demand, and under it the defendant may prove any matter which tends to defeat the cause of action. He may offer evidence to establish ownership and right of possession of the property in himself; and if he tries the case upon that theory, he ought not, on a review of the case in the appellate court, to be heard to say that the plaintiff never demanded the property. Had Rodgers, in the case at bar, offered no testimony under the general denial for the purpose of establishing property in himself, the case cited would be on all fours with this, but as he contested the case on a claim that he had a right to detain the property, the decision in 18 Nebraska lacks analogy.

It is finally insisted that the plaintiff was not entitled to a judgment for costs for the reason that the mortgage was given to secure a usurious loan of money. The uncontradicted evidence shows that the note, for which the mortgage was given to secure, was usurious to the extent at least of \$15. The plaintiff having planted his right to

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recover upon a contract confessedly usurious, the defendant was entitled to recover his costs. (See *Omaha Auction & Storage Co. v. Rogers*, 35 Neb., 61.)

The judgment of the district court is affirmed, except as to costs, which is reversed, and judgment for defendant below for his costs in both courts will be rendered against the plaintiff.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LINCOLN NATIONAL BANK, APPELLANT, v. A. C.
VIRGIN ET AL., APPELLEES.

36	735
159	758
36	735
62	781

FILED APRIL 26, 1893. No. 5010.

1. **Mortgage Foreclosure: EFFECT OF DECREE BY DEFAULT.**

The rule is that a default by a party defendant is a confession only of such matters as are properly alleged in the petition or complaint. But a recognized exception to that rule is that where in a foreclosure or other kindred proceeding a defendant, who is called upon to disclose and set up his supposed but unknown interest in the subject of the action, makes default, he will be held to have admitted that his interest therein is subject to that of the plaintiff.

2. **A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity.**

3. **Mortgage Foreclosure: DEFAULT: DECREE.** In a foreclosure proceeding by N. against the M. Bank, a subsequent mortgagee, and V., their common mortgagor, it was alleged that "The M. Bank claims some interest in the premises, the nature and extent of which is to the plaintiff unknown, but is subordinate to plaintiff's claim, wherefore plaintiff asks that it be compelled to set the same up or be forever barred." The defendants all having made default, a decree of foreclosure was entered in

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which it was found that the M. Bank had no right, title, or interest in the mortgaged property. In a subsequent action by the M. Bank to foreclose its mortgage, *held*, that the former decree cannot be pleaded as a bar by V. or his grantees.

APPEAL from the district court of Seward county.
Heard below before BATES, J.

Norval Bros. & Lowley, for appellant.

Colman & Colman, Geo. B. France, and D. C. McKillip, contra.

Post, J.

This action was commenced in the district court of Seward county to foreclose two mortgages executed by A. C. Virgin and wife on the 24th day of September, 1888, to the Merchants Bank of Utica, to secure payment of a note of the mortgagors of that date for \$2,500, due six months after date. It is alleged in the petition that said note and mortgages were assigned by the Merchants Bank to the plaintiff for value before maturity. Upon a hearing before the district court, all of the defendants being in default, except Severin & Schark, a decree of foreclosure was entered as prayed upon the mortgage described in the second cause of action, but as to the first cause of action, viz., the mortgage covering the west half of the southwest quarter of section 20, township 11, range 1 east, there was a finding for the answering defendants, and a decree dismissing the petition, from which the plaintiff has appealed. The execution of the mortgage for the consideration alleged by Virgin and wife, who were at the time the legal and equitable owners of the property, is not denied.

The defendants above named, by their answer, deny the assignment of the note and mortgage to the plaintiff and allege that the Merchants Bank is still the owner and holder thereof. They further allege that they are the owners in fee-simple of said property by deed from Virgin

and wife bearing date of August —, 1889; that on the 16th day of March, 1889, one Neir, the holder of a prior mortgage upon said premises, which was executed March 12, 1887, commenced thereon an action of foreclosure in the district court of Seward county, to which the Merchants Bank of Utica, while still owning and holding the note and mortgage in controversy, was made a party defendant, but made default; that upon a final hearing in said action there was a finding and decree for the defendants Virgin and wife against the Merchants Bank as to the mortgage now in question, and a decree declaring it void as to the land in controversy, by reason of which the Merchants Bank and the plaintiff, as its assignee, are now estopped as against them to assert any claim under or by reason of the mortgage described in the petition.

For a second defense it is alleged that the defendants purchased for value in good faith, relying upon the representations of the Merchants Bank that it claimed no interest in, or lien upon, the land in controversy by virtue of the mortgage upon which this action is based.

The reply is, in effect, a general denial.

The evidence with respect to the date of the assignment of the note and mortgage is voluminous and conflicting, but in view of our conclusion upon the other propositions it is unnecessary to critically examine that question.

The plea of *res judicata* is clearly insufficient as a defense. The decree relied on, assuming that it is a determination in favor of Virgin and wife that the mortgage under consideration is not a lien upon the premises, is not responsive to any claim or allegation in any pleading before the court, and is for that reason *coram non judice*. The petition filed by Neir contained the following allegation only with reference to the Merchants Bank: "The defendant, the Merchants Bank of Utica, has, or claims to have, some lien or interest in said premises, the nature of which is to plaintiff unknown, but plaintiff avers that the

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same is subordinate and junior to plaintiff's claim, and plaintiff asks that it may be compelled to set the same up or be forever barred from asserting the same." The foregoing allegation is followed by a prayer for an accounting, order of sale, and deficiency judgment. In that proceeding, as already said, Virgin and wife, as well as the Merchants Bank, made default. In the decree, which is in the ordinary form, immediately following the finding for the plaintiff therein, is the entry upon which defendants rely, viz., "The court further finds that the defendant, the Merchants Bank of Utica, has no right, title, or interest in the land in controversy herein."

This case rests upon an entirely different principle from those cases in which the court had acquired jurisdiction over the subject of the judgment or decree. In such cases the determination of the court, however erroneous, can be called in question only by direct proceedings. We are aware that Mr. Freeman in his work on Judgments, sec. 135a, expresses a preference for the view that a judgment is erroneous merely, and not necessarily void, although not responsive to any issue of law or fact. We are, however, unable to perceive wherein a judgment entered by a court confessedly outside of the issues submitted for its determination can be said to rest upon any other or different principle than one in which the subject-matter is entirely foreign to the jurisdiction conferred upon it. In the language of the supreme court of Ohio, in *Spoors v. Coen*, 44 O. St., 497, "A judgment by a court of competent jurisdiction in a case before it, however erroneously that jurisdiction may have been exercised, is one thing, and a judgment by a court of like jurisdiction in a case not before it, is another and quite a different thing. In *Sheldon v. Newton*, 3 O. St., 494, Judge Ranney uses this language: "It is *coram judice* whenever a cause is presented that brings this power into action. But before the power can be affirmed to exist it must be made to appear that the law has given the

tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred," etc. The distinction above noted is abundantly sustained by authority. See, in addition to cases cited, *Strobe v. Downer*, 13 Wis., 11; *Straight v. Harris*, 14 Id., 553; *Lewis v. Smith*, 9 N. Y., 502; *Williamson v. Probasco*, 8 N. J. Eq., 571; *Steele v. Palmer*, 41 Miss., 89; *Armstrong v. Barton*, 42 Miss., 506; 1 Black, Judgments, 183, 184.

There is no doubt of the jurisdiction of a court of equity upon proper pleadings in a foreclosure proceeding, to determine the rights of all parties thereto with respect to the subject of the controversy, whether plaintiffs or defendants. But the power to conclude parties not claiming adversely to the plaintiff, whether subsequent mortgagees, or mortgagor and mortgagee, so as to prevent them from afterwards asserting their rights as against each other, depends upon whether such power has been invoked by one or more of the parties thus interested. In the judgment pleaded as a bar in this case, the only relief sought was the foreclosure of the Neir mortgage. In his petition the plaintiff therein alleged, in effect, that his mortgage was the prior lien. That was a proposition which the Merchants Bank could not controvert. It is true it might have answered (assuming that it was still the owner of the mortgage) and by cross-bill secured an accounting and decree against the mortgagors, and an order for payment from the proceeds of the mortgaged property after the satisfaction of the prior lien. The general rule is that a default is an admission of such facts only as are properly alleged in the petition or complaint. (Herman, Estoppel, sec. 53.) A recognized exception, however, is that where, in a foreclosure or other kindred proceeding, a defendant who is called upon to disclose his supposed but unknown interest in the subject of the action makes default, he will be held thereby to have admitted that his interest therein is subordinate to

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that of the plaintiff. (*Barton v. Anderson*, 104 Ind., 578.) The Merchants Bank, by its default, must be held to have confessed the cause of action of the plaintiff therein, and to that extent the decree is conclusive. But the question of the validity of the mortgage now under consideration, as a second lien, was not presented by the petition, and the bank, as a defendant in that action, was justified in assuming that Neir, the plaintiff, was merely seeking to assert his own lien. The judgment described in the answer not being conclusive as against the Merchants Bank, it follows that the question of the good faith of the assignment of the mortgage to the plaintiff is not material. (*Mc Williams v. Bridges*, 7 Neb., 419.)

2. The plea of estoppel *in pais* is not sustained by the proofs. Not only was the mortgage to the Merchants Bank of record and unsatisfied in Seward county, but the answering defendants are conclusively shown to have had actual notice of it and to have taken counsel as to its validity. One of them, Mr. Severin, on his cross-examination, admits that previous to the purchase of the land he had a conversation with reference to the mortgage in question with Mr. Hurlburt, president of the bank, in which he was informed by the latter that said note and mortgage had been pledged to the plaintiff herein for money advanced by it. He testifies among other things as follows:

Q. You know at the time you bought the land that he had put up these notes at the Lincoln National Bank before you took the deed and paid the money?

A. The abstract showed the mortgage on it.

Q. Notwithstanding that decree Mr. Hurlburt told you that he had put that mortgage up at the Lincoln National Bank?

A. He said he had put it up as collateral security.

Q. You knew that when you bought the land?

A. Yes, sir.

Smith v. Gardner.

It is very evident that the defendants were fully aware of the facts with reference to the mortgage, and purchased the property in the mistaken belief that, by reason of the decree above referred to, it was no longer a lien thereon—a claim which, so far as the record discloses, had never been made by their grantors. The court therefore erred in dismissing the petition of the plaintiff. The decree of the district court will be reversed and the case remanded with instructions to enter a decree of foreclosure in accordance with the prayer of the petition.

REVERSED AND REMANDED.

THE other judges concur.

S. S. SMITH ET AL. V. BENJAMIN GARDNER ET AL.

36	741
60	523

FILED APRIL 26, 1893. No. 4975.

1. **Promissory Note: POSSESSION BY MAKER AFTER MATURITY: PRESUMPTION OF PAYMENT.** The possession of a promissory note by the maker after maturity thereof is *prima facie* evidence of payment.
2. ———: ———: ———: **INSTRUCTIONS.** But the force of the presumption of payment from the possession of a note by the maker depends upon the circumstances of the particular case. It is error, therefore, to instruct the jury that possession of a note raises a strong presumption of payment or is a strong circumstance to prove payment.

ERROR from the district court of Greeley county. Tried below before HARRISON, J.

T. J. Doyle, for plaintiffs in error.

G. C. Wright and *E. E. Wright*, *contra*.

Post, J.

This action was commenced in the county court of Greeley county by the plaintiffs in error to recover on a note for \$75, executed by Margaret Green and Benjamin Gardner, payable to the order of E. D. Barrett, and taken to the district court of said county by appeal. Mrs. Green having died in the meantime, the action was revived in the name of the other defendant as her executor.

There are two defenses suggested by the answer: First, failure of consideration; and, second, payment; but inasmuch as the first defense was abandoned at the trial, it does not call for further notice in this connection. A trial in the district court resulted in a verdict and judgment for the defendants, which it is sought to reverse by petition in error to this court.

The first contention of the plaintiff in error is that there is no sufficient allegation of payment in the answer, which is as follows: "And the defendants as a separate defense say that the note declared upon has been fully satisfied and delivered to the defendants for cancellation." It must be confessed that the foregoing allegation is exceedingly indefinite and ambiguous when construed as a plea of payment. The statement that the note has been fully satisfied is certainly a conclusion of law, but we think from the allegation that it was delivered up to defendants for cancellation, the inference of payment is warranted. The proof relied upon to sustain the claim of payment is the fact that after the death of Mrs. Green the note in suit was found among her papers, while Mr. Smith, one of the plaintiffs, testified positively that the note had never been paid, but that the deceased obtained it from his possession on the pretense that she wished to examine it and fraudulently refused to surrender it. Upon the introduction of the foregoing evidence the court, among others, gave the following instruction, to which exception was taken:

"You are further instructed that the possession of the note by Margaret Green is a strong circumstance to show payment unless explained by the plaintiffs in the action."

We think the giving of the above instruction was error. We do not question the soundness of the proposition that possession of a note by the maker thereof after maturity is *prima facie* evidence of payment, but what is denominated a presumption of payment in such a case is a mere logical inference from the fact of possession, and may be strong or weak, according to the circumstances of the particular case.

Wharton defines a presumption of fact as "a logical argument from fact to fact." (2 Wharton, Ev., sec. 1226.) And in the same volume, section 1237, the author in defining presumption of law as distinguished from presumption of fact uses this language: "The conditions to which are attached presumptions of law are fixed and uniform, those which give rise to presumptions of fact are inconstant and fluctuating."

Prima facie evidence is defined by Starkie as "that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be credited by the jury, unless it be rebutted or the contrary proved." (Stark., Ev. [10th Am. ed.], 818.)

Possession of the note by the deceased at the time of her death is not only a circumstance tending to prove payment; but from which payment would ordinarily be the logical inference. It is, therefore, proper in such a case to instruct the jury that possession is presumptive or *prima facie* evidence of payment, which will, if uncontradicted or unexplained, warrant a verdict in favor of the party alleging it. But the force of such presumption must always depend upon the circumstances of the case. (*Larimore v. Wells*, 29 O. St., 13.) It is error, therefore, to advise the jury that possession of a note by the maker raises a strong presump-

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tion of payment, or is a strong circumstance to prove payment.

An important question presented by the record is not discussed in the briefs of counsel, and is, for that reason, not determined, viz., whether the identification of the note by executor and its introduction in evidence for the purpose of proving payment by deceased to the plaintiffs is such a foundation as will qualify the latter, under section 329 of the Code, to testify as a witness, and to explain the means by which the deceased obtained possession of the note.

REVERSED AND REMANDED.

THE other judges concur.

36 744
50 100

WOOD RIVER BANK OF WOOD RIVER V. FIRST NATIONAL BANK OF OMAHA.

FILED APRIL 26, 1893. No. 4596.

1. **Inland Bills of Exchange: PROTEST.** The term "protest," as applied to inland bills of exchange, includes only the steps essential to charge the drawer and indorser.
2. **Bank Checks: LIABILITY OF INDORSER: DISHONOR: NOTICE.** Bank checks in this country are regarded as inland bills of exchange for the purpose of presentment and demand, and notice of dishonor, and do not require a formal protest in order to charge the indorsers.
3. —: **DAYS OF GRACE: PRESENTATION.** They are also due upon presentation, and not entitled to days of grace.
4. —: **LIABILITY OF INDORSEE FOR COLLECTION FOR FAILURE TO PROTEST: TIME FOR NOTICE.** A bank receiving for collection from a correspondent checks drawn upon it by a customer with instructions to protest in case of non-payment, is required, in case payment is refused for want of funds, to give notice to the bank from which they were received not later than the next

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day after the dishonor. And when they are held for two days in order to enable the drawer to provide funds for payment thereof a jury will be warranted in finding that the bank intended to accept them and become liable thereon.

5. ———: ———: EFFECT OF DELIVERY TO NOTARY. The general rule is that where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter.
6. ———: ———: ———: NOTARY AGENT OF BANK. But where such bill remains in the bank to be protested for non-payment by the president and manager thereof, a notary public, and who, although aware of the instructions to the contrary, delays noting for protest or giving notice, in consequence of which the indorsers are discharged, such notary will be held to be the agent of the bank, and the latter will be liable for his negligence.

ERROR from the district court of Hall county. Tried below before HARRISON, J.

James H. Woolley, for plaintiff in error.

W. H. Thompson, *contra*.

POST, J.

This was an action in the district court of Hall county to recover for the failure of the defendant below, plaintiff in error, to give notice of the dishonor of certain checks received by it for collection from the plaintiff below, by reason of which certain indorsers thereon were discharged, to the damage of the latter. The facts as they appear from the pleadings and proofs are substantially as follows:

About the 11th day of January, 1887, at Ravenna, in Buffalo county, one Hillebrandt drew eleven checks to the order of as many different payees upon the defendant, the Wood River Bank, doing business at Wood River, Hall county, amounting in the aggregate to \$737.28. The checks aforesaid were all cashed by the Farmers Bank of Ravenna, upon the indorsement of the several payees, and upon the day above named were transmitted by it with

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proper indorsements for collection to the First National Bank of Omaha. On the evening of the next day, January 12, the last named bank forwarded them by mail, properly indorsed, for collection to the defendant bank at Wood River, with instructions to protest unless promptly paid.

The evidence is conflicting with respect to the time of the receipt of the checks by the defendant. If we regarded that question as decisive of the case, we would feel constrained to resolve it in favor of the defendant, notwithstanding the finding of the jury that they were received by it on the evening of the 13th. Both Hockenberger, the cashier, and Hollister, the president, testify positively that the checks were received by the bank on the afternoon of the 14th. But the judgment is right nevertheless. It is evident from their testimony that the checks were received at the bank before the close of its business on the 14th; that they were opened and examined by the witnesses, who were both aware that there were no funds to the credit of the drawer, and who delayed giving of notice or taking of any steps for the protection of the plaintiff below, in order to enable Hillebrandt to provide funds to balance his account the next day. It is admitted also that the defendant bank continued to pay Hillebrandt's checks in favor of home customers, although no entries appear to his credit on its books subsequent to the 13th. The jury were warranted upon the admitted facts in finding that the bank intended to accept the bills and that by its delay it became liable thereon. (*Northumberland Bank v. McMichael*, 106 Pa. St., 460.)

Checks like those in question are to be regarded as inland bills of exchange, therefore protest is not essential in order to preserve the rights of antecedent parties (*Hughes v. Kellogg*, 3 Neb., 194; *Daniel*, Neg. Insts., 926; *Chitty*, Bills [8th ed.], 500, 501), although the holder is required to exercise the same degree of diligence in giving

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notice of dishonor as in cases where a formal protest is necessary. The term protest as applied to inland bills is used in its popular sense and means the steps essential in order to charge the drawer and indorsers. (Daniel, Neg. Insts., 929; *Ayrault v. Pacific Bank*, 47 N. Y., 570.) It was the duty of the defendant bank to promptly give notice of the non-payment of the checks, either directly to the bank from which they were received, or to place them in the hands of a notary public for protest and notice. Bank checks, unlike bills of exchange, are due on the day they are presented for payment and not entitled to days of grace. (Boone, Bkg., 165, 250; *Morrison v. Bailey*, 5 O. St., 13; *Champion v. Gordon*, 70 Pa. St., 474; *Fletcher v. Thompson*, 55 N. H., 308; 2 Am. & Eng. Ency. of Law, 398.) The checks in question were dishonored on the 14th when received through the mail, and payment refused for want of funds. Both the president and cashier, the only managing officers, knew that Hillebrandt's account was overdrawn; there was, therefore, no occasion for time to examine their books.

It is said by Chancellor Kent, 3 Kent's Com., 105: "According to modern doctrine, the notice must be given by the first direct and regular conveyance. This means the first mail that goes after the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer and indorser reside out of town, the notice may indeed be sent on Thursday, but *must* be put into the post-office or mailed on Friday so as to be forwarded as soon as possible thereafter."

The next inquiry is whether by delivering the checks to the notary public on the 15th for protest the defendant discharged its duty to the plaintiff, for it is clear, upon authority, that that was the latest day on which notice could have been given in order to charge the indorsers. The rule sanctioned by the weight of authority is conceded to be that a bank which places paper in the hands of notary

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public with directions to proceed in such manner as to protect the rights of the beneficial owner and indorsers will not be held liable for the failure of the notary to discharge his duty. (See Boone, Bkg., 205; 2 Am. & Eng. Ency. of Law, 113.) But this case cannot be held to be within the rule just stated. Here the notary was the president and managing officer of the bank and who, being aware of the dishonor of the checks on the 14th, did not protest them for non-payment or notify the plaintiff or other indorsers of that fact until the 17th. It is evident, too, that the cashier was aware of the dereliction of the president, for the checks appear to have remained in the bank during all the time, and whatever was done by the latter by way of noting protest, giving notice, etc., was with the knowledge of the former. It is true the 16th was Sunday, but the default occurred on the 15th. It was the duty of the notary on that day to notify the plaintiff by mail of the dishonor of the paper. The failure to protect the plaintiff as an indorser is directly attributable to the fault of the managers of the bank and it will not be permitted to take refuge behind the notary, and to interpose his negligence as a defense. Upon the facts of this case, the notary will not be held to be the agent of the plaintiff but rather of the defendant. (*Commercial Bank v. Barksdale*, 36 Mo., 563.)

2. The plaintiff below assumed the burden of proving the solvency of the first indorsers, the payees of the several checks. For that purpose Mr. Davis, the cashier of the Farmers Bank of Ravenna, was called as a witness and testified that he was acquainted with the financial standing of the parties named and that he considered them good for the amounts named in the checks bearing their respective indorsements. From his cross-examination it appeared that one or more of them were somewhat embarrassed financially. It is now urged that there is not sufficient evidence of the solvency of the indorsers, hence it cannot be said

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that the plaintiff has been damaged. This argument is fully answered by the opinion of Judge LAKE in *Steele v. Russell*, 5 Neb., 211. The fact that the indorsers may have been unable to meet all obligations at maturity does not conclusively establish their insolvency such as to constitute a defense in this action.

The judgment of the district court is right and is

AFFIRMED.

THE other judges concur.

**W. J. CONNELL, APPELLEE, V. ELIZABETH GALLIGHER
ET AL., APPELLANTS.**

FILED APRIL 26, 1893. No. 4780.

1. **DEEDS: DEFECTIVE CERTIFICATE: EFFECT AS BETWEEN GRANTOR AND GRANTEE.** A deed in other respects sufficient and regular is effective, as between the grantor and grantee therein, to pass complete title even though executed in a foreign state it is there acknowledged before only a purported justice of the peace as to whose genuine signature, official character and power, there is no accompanying certificate of a proper officer having a seal.
2. ———: ———: ———: **DECREE TO REMEDY DEFECT: STRANGERS TO SUIT.** A decree obtained for the purpose of obviating the objection that the acknowledgment of a deed was not shown to have been proved by the certificate of a duly authorized officer is operative only against parties to the action and others in privity with such parties. Whatever rights are held by a stranger to such a suit are unaffected by such a decree.
3. **SUMMONS: OFFICER'S RETURN: EVIDENCE TO IMPEACH.** To impeach the return of an officer of the due service by him of a summons, the evidence must be clear and satisfactory.
4. **ATTORNEY'S APPEARANCE: AUTHORITY: BURDEN OF PROOF.** Where want of authority to appear for a defendant against whom

36	749
39	796
36	749
43	79
43	263
36	749
46	872
36	749
48	516
36	749
54	637
36	743
57	290

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judgment has been rendered is alleged to invalidate such judgment, the burden of proof of such want of authority is upon the party asserting the same.

5. Power of Attorney: CONVEYANCE OF REAL ESTATE: DESCRIPTION. In a power of attorney to convey real property the true function of the description is not necessarily to identify the land, but may be only to furnish the necessary means of identification. If such description can be made complete by an examination of the public records, and the records of judicial proceedings clearly indicated in such description, it is a sufficient identification of the subject-matter of such power of attorney.

APPEAL from the district court of Douglas county.
Heard below before TIFFANY, J.

Gregory, Day & Day and George M. O'Brien, for appellants.

Connell & Ives, contra.

RYAN, C.

The real property which is the subject-matter of this action is lot 6 in Smith & Griffin's addition to the city of Omaha. This lot is a part of the northwest quarter of section 28, in township 15 north, range 13 east of the 6th principal meridian. The opinion of the supreme court in *O'Brien v. Gaslin*, 20 Neb., 347, settled several questions as to lots 8, 9, and 12 in this same addition, thereby eliminating similar questions from this action. In the case just cited will be found an abstract of the title of the above described 80-acre tract, covering many of the conveyances hereinafter discussed, which it is not deemed necessary now to reproduce. To the understanding of the discussions hereinafter it is believed that supplementary to the reference to the above plat it will be sufficient to give the following description of the parties, their interests, the source of their claims, and their several contentions:

Augustus Graeter, Jr., was the owner of the whole 80-

acre tract on October 20, 1857. On that day he conveyed the undivided one-half of said property to James E. North, and the other undivided one-half he conveyed to Augustus Graeter, Sr. Each conveyance was by warranty deed, which deeds were recorded on the last date above named. James E. North, by warranty deed, on January 9, 1858, conveyed back to Augustus Graeter, Jr., the undivided one-half of said property of which he had been vested with title as above stated. On January 12, 1858, Augustus Graeter, Sr., executed a warranty deed to Augustus Graeter, Jr., for the undivided one-half of said property which he held by virtue of the conveyance aforesaid. This deed was executed in Ohio and acknowledged before a purported justice of the peace, and did not have a certificate of the proper certifying officer of the county where the acknowledgment was taken, under seal of his office, showing that the officer who took the acknowledgment was in fact the officer he assumed to be; that such certifying officer was acquainted with the handwriting of said justice of the peace, and believed his signature to be genuine, and that the execution and acknowledgment were according to the laws of the state wherein the execution thereof took place. A decree was relied upon to obviate these objections, to which further reference will be made hereafter.

In the suit of Wood v. Baugh, Dawkins, and Graeter a judgment was recovered against each of the defendants, including Augustus Graeter, Jr., upon alleged personal service of summons upon him, and the appearance of George B. Lake as attorney for the defendants. Under this judgment a sale of the premises was made to J. M. Woolworth, by whom a deed of the entire property was executed to Robert K. Woods, who, by power of attorney, authorized said J. M. Woolworth to convey the property therein irregularly described. (There arises upon this power of attorney a serious contention as to the sufficiency of the description of the property in respect of which the attorney

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in fact was authorized to make conveyance.) Under this power of attorney J. M. Woolworth made conveyance of the entire property, whereunder, by *mesne* conveyances, the appellee W. J. Connell derives his title.

By reason of the defective proof of the power of the justice of the peace to take the acknowledgment as above noted, the appellants claim that Graeter, Jr., at the time of said sheriff's sale, owned only an undivided one-half of the property described in the sheriff's deed, the other half (as to which, as appellants insist, the defective acknowledgment avoided the deed) appellants maintain is held by the grantees of Graeter, Jr., by an equitable title, whatever may be held as to the other points upon which they rely. The appellants further contend that the court obtained no jurisdiction of Graeter, Jr., in the case of Woods v. Baugh, Dawkins, and Graeter, for that no summons therein was ever served on said Graeter, Jr., and because the appearance of Judge Lake for defendants in said cause was without authority from Augustus Graeter, Jr. As the result of these contentions appellants assert that the title to the whole property was held by Graeter, Jr., on December 9, 1874, by whom on that date it was by quitclaim deed conveyed to James E. North, by whom by quitclaim deed of date, March 16, 1886, Elizabeth Galligher derives whatever title she has to the premises aforesaid, and that by reason of the defects, hereinafter to be considered, in appellee's chain of title her title is unaffected by appellee's claim of title. To the proper settlement of these contentions it will be necessary to consider the following questions:

First—What was the effect of the failure to show the due execution of the certificate of acknowledgment of the deed of Augustus Graeter, Sr., to Augustus Graeter, Jr., and how far was this irregularity cured by decree?

Second—What jurisdiction had the court of Augustus Graeter, Jr., personally, when it rendered judgment in favor of Woods v. Baugh, Dawkins, and Graeter?

Third—Was the subject-matter of the power of attorney of Robert K. Woods to J. M. Woolworth so defectively described that, thereunder, said attorney in fact could convey no title?

1. The first question was in fact considered in *O'Brien v. Gaslin*, *supra*, which was an action of ejectment brought by Gaslin against the other parties to the suit. Plaintiff's chain of title, and consequent right of possession, in that case, could be made complete only by introducing in evidence the record of the deed, as to which there was no proof that the acknowledgment was taken by a justice of the peace authorized to take such acknowledgments. It was therefore held that as the record of the deed under such circumstances was a nullity and inadmissible against a subsequent purchaser of the land, it devolved upon the plaintiff to offer a deed properly certified as part of his chain of title, and until he did do this, the adverse party might rely upon his possession alone as a defense. Like the above, the case at bar was begun by ejectment simply for the possession of the property in dispute. On motion of the appellants it was upon equitable issues, which involved as well the title as the right of possession, tried as an equitable action. It well might be that under such circumstances the want of certification noticed would be of different effect in a cause wherein all questions of title were at issue, as compared with one wherein was involved only the right of possession, such right depending upon the introduction in evidence of a deed imperfectly proved as such. The decision of this case, however, does not require us to determine what if any difference should be observed, and no such determination will be attempted.

Appellants contend that at least the defect in the proof of due acknowledgment of the deed from Graeter, Sr., to Graeter, Jr., was to vest in Graeter, Jr., a mere equitable title, and that such a title could not be divested by the sheriff's sale made under the judgment rendered in the case

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of *Woods v. Baugh et al.* This, it is claimed, results from the holding of this court that a judgment lien cannot attach to a mere equity. (*Nessler v. Neher*, 18 Neb., 649.) In *Rosenfeld v. Chada*, 12 Neb., 25, it was held, however, that an equitable interest in real estate, coupled with actual possession, could be sold under an ordinary execution, and from the proofs adduced as to possession in this case by appellants, it would not be wholly without warrant to find such possession as would be necessary to bring this case within the rule in the last cited case upon appellants' own theory. But it is not believed correct to assume that by reason of the defective proof of the powers and acts of one who assumed to take, as an officer, the grantor's acknowledgment of the deed in question, an equitable interest in any way resulted by operation of this deed. An equitable interest is one that can be made available, effective, or sustained in a court of equity, is the definition given by Webster and Abbott. In *Harrison v. McWhirter*, 12 Neb., 155, it was held that neither acknowledgment nor recording is necessary to pass the title from the grantor to the grantee. As between Graeter, Sr., and Graeter, Jr., therefore, the deed as to which there was defective proof of acknowledgment operated to vest in the grantee whatever title was held by the grantor, in this case an undivided one-half of the real property in the deed described. The defect was simply as to proof of an incident to the due acknowledgment of a deed executed in another state. As between the grantor and grantee the contract of conveyance was complete when the deed was signed and delivered. Section 50, chapter 73, Compiled Statutes, provides that "every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." The deed under consideration was in form a warranty deed, from which no intent other than to convey all the interest of the grantor could be inferred. Therefore, it necessarily follows that

no mere equitable interest as distinguished from the legal title passed by operation of this deed.

To obviate the want of proof of the official capacity of the person who, as justice of the peace, made the certificate of acknowledgment of the Graeter, Sr., deed, and of the due execution of such certificate, the appellee, on December 3, 1886, filed his petition in the district court of Douglas county against the heirs of Augustus Graeter, Sr., who had meantime died; in which petition the appellee set forth the history of the execution of the deed from Graeter, Sr., to Graeter, Jr., with the failure properly to prove the facts necessary to render valid the acts of the alleged officer who certified to such acknowledgment, and after describing the *mesne* conveyances by which the title as alleged had vested in him, the appellee prayed that he be decreed the legal and equitable owner of the real estate involved, and that within a time to be fixed by the court the defendants be decreed to convey such real estate to him; that in default of such conveyance within the time required, the clerk of said court make such deed with the same effect as though executed by the defendants.

Service by publication was duly had upon all the defendants, who were non-residents of Nebraska, and in due time a decree by default was taken against each of them as prayed. The appellants contend that this decree and deed is not operative as to their rights, for the decree was against parties other than appellants, and with whom appellants were not in privity as to the property affected. The appellee insists that the decree was but a link in his chain of title, admissible as against a stranger, and that it cannot be attacked collaterally. In support of his contention the appellee cites *Barr v. Gratz*, 4 Wheat. [U. S.], 220; *Lessee of Buckingham v. Hanna*, 2 O. St., 551; *Den v. Hamilton*, 12 N. J. L., 109; *Baylor's Lessee v. Dejarnette*, 13 Gratt. [Va.], 152; *Barney v. Patterson*, 6 Har. & J. [Md.], 182; *Secrist v. Green*, 3 Wall. [U. S.], 744; *Gregg v. Forsyth*,

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24 How. [U. S.], 180; *Freydendall v. Baldwin*, 103 Ill., 325; *Lathrop v. American Em. Co.*, 41 Ia., 549; Freeman, Judgments, sec. 416. Each of these cases merely recognizes the principle that, where the decree formed a link in the chain of title, it was neither more nor less *res inter alios acta* as to third parties than would be a deed supplying the necessary link. The deed under which appellant Elizabeth Galligher claims title was dated March 16, 1886, and was filed for record the same day. Let us suppose, now, that on the date when the above petition was filed, December 3, 1886, or on the day when the decree thereon was obtained, March 18, 1887, all the heirs of Augustus Graeter, Sr., had joined in a deed of the property to appellee, upon what principle could it be claimed that such deed would affect the rights of said appellant? And yet the authorities cited only sustain the proposition that the decree would operate to the same extent as would a deed, as furnishing a necessary link in the chain of title. In either case, as against whatever rights appellant Elizabeth Galligher then held, a decree or deed under the circumstances was not binding. If the action had been one to establish appellee's title as against Elizabeth Galligher and incidentally to prove the qualifications of the alleged justice of the peace to certify an acknowledgment of the deed, another question would have been presented. But to allow proof of title so as to affect the existing rights of one not a defendant, or in privity with a defendant, would be fraught with serious danger of rank injustice perpetrated under the forms of law.

The case at bar is, however, in effect, an equitable action to quiet, as against the appellants, the legal title which, as between the grantor and grantee, was vested in the grantee, under whom appellee claims his title. The judgment in case of *Woods v. Baugh, Dawkins, and Graeter* was rendered on the 1st day of November, 1859, from which date, if the court had jurisdiction to render such judgment, it became a

lien upon the property under consideration. Under this judgment there were two sheriffs' deeds, one of date August 14, 1861, the other of date January 22, 1870, each founded on the sheriff's sale made on March 15, 1861. The first of these sheriffs' deeds was recorded on August 14, 1861; the last on January 22, 1870. As against the title derived through these sheriffs' deeds, appellants claim by virtue of a deed executed by Augustus Graeter, Jr., to James E. North December 9, 1874, who conveyed to Elizabeth Galligher March 16, 1886. Each of these conveyances was by quitclaim deed. The holder of a title under a quitclaim deed is not a *bona fide* purchaser. (*Lavender v. Holmes*, 23 Neb., 345.) The effect of a quitclaim deed is only to pass the naked legal title of the grantor. It changes no equities. (*Lincoln B. & S. Ass'n v. Hass*, 10 Neb., 581.) Elizabeth Galligher is entitled to assert only such rights as Graeter, Jr., could if he had not conveyed, and it therefore results, if the execution sale aforesaid was effective to vest J. M. Woolworth with the title which we have already found was in Graeter, Jr., that, in the absence of any defect in his chain of title from Woolworth, appellee's title must be held superior to that of appellants.

2. This leads to the consideration of the objections urged as to the binding force of the judgment in favor of Woods as against Augustus Graeter, Jr., one of the defendants. The district court found that "in the action of Woods et al. v. Dawkins, Graeter et al., referred to in the defendants' answer and cross-bill, A. F. Graeter was duly served with summons in said action and appeared in the court, and that the court had jurisdiction in the action of the said parties thereto and the subject-matter thereof." This finding of fact might be sustained upon the presumption in its favor equally with that in favor of the special verdict of jury, yet, as it is earnestly combated, it will not be amiss upon appellants' invitation to examine fully the objections urged. The summons in the case of Woods et

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al. v. Baugh, Dawkins, and Graeter was introduced in evidence, indorsed as served upon Baugh, Dawkins, and Graeter by delivering to each of them personally a true copy thereof on the 5th day of March, 1859. It was signed J. C. Reeves, sheriff, by R. Kimball. It was shown by extraneous evidence that at that time R. Kimball was deputy sheriff of Douglas county, Nebraska. The appellants introduced the testimony of Graeter, taken by deposition June 20, 1889, to the effect that he had never been served with summons in the case last named and had never employed or authorized the employment of an attorney to appear in said cause in his behalf. The testimony of six other witnesses, with more or less directness, is to the effect that at the time of said purported service Graeter was at or on his way to Pike's Peak; at any rate he was not in Douglas county. In addition to this there was given the testimony of one or more witnesses that Kimball, upon the above return being shown him, had said that the signature thereto was not his signature. In passing, it may not be amiss to remark that this is not shown to be admissible as evidence by the authorities cited by appellants, and we believe that it was inadmissible for lack of the very essential element, *that it was against Kimball's interest* at the time he made the statement. On the other hand the return itself was relied upon as the foundation for the judgment rendered about thirty years before, supplemented by the evidence of competent experts, who each swore unhesitatingly that the signature was that of Richard Kimball. In addition to this George B. Lake testified that he was duly employed on behalf of the defendants to appear for them in said suit, and that he did so for the purpose of delay, there being no meritorious defense. He did not undertake to say that he was specially employed by Graeter, but that the other defendants were copartners with Graeter, and he could say no more than that he was employed by some member of the firm—he could not say which. The judg-

ment was rendered November 1, 1859, and thereunder an execution sale was had, which was duly confirmed, and sheriff's deeds were issued pursuant thereto, and no question has been made as to the regularity and effectiveness of any of these proceedings until the lapse of over thirty years, and even now it is in a purely collateral proceeding.

A careful examination and consideration of the adjudged cases satisfy us that this attempt should not be successful. In one of them cited by appellants in support of their contention (*Murphy v. Lyons*, 19 Neb., 689) the rule is laid down that the decrees and judgments of a court of general jurisdiction and power are presumed to have been made in causes in which the court had jurisdiction until the contrary is proved.

In *Wyland v. Frost*, 75 Ia., 210, Rothrock, J., delivering the opinion of the court, said: "The return shows that the notice was personally served on the plaintiff and her husband on the 26th day of July, 1882, at Harlan, in Shelby county. The plaintiff and her husband, and others, testify that neither the plaintiff nor her husband was at Harlan on that day. None of the witnesses produced any record, memorandum, or circumstances tending to verify or support their testimony. Their statements are founded upon mere recollection, and suit was not commenced until about three years and a half after the judgment was rendered. On the other hand we have the return of the constable who made the service, and his testimony, in which he states positively that he made the service at the house of the plaintiff and her husband at Harlan on the day named in the return. He is corroborated by evidence that the notice was actually delivered to him for service on the morning of that day, and the plaintiff and her husband are contradicted in reference to incidental facts which tend to show that the claimed absence on the day of service was a mistake. A careful examination of the whole evidence in the case leads us to the conclusion that the district court cor-

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rectly found that the evidence introduced by the plaintiff is not of that clear, conclusive, and satisfactory character required to overthrow the return of the officer. It has been held in some jurisdictions that the only remedy for a false return of service is an action upon the bond of the officer claiming to have made the service. (*Slayton v. Chester*, 4 Mass., 478; *Bott v. Burnell*, 9 Id., 96; *Messer v. Bailey*, 31 N. H., 9; *White River Bank v. Downer*, 29 Vt., 332.) But conceding the rule to be otherwise for the purposes of this case, we think that the evidence of the plaintiff falls far short of establishing the falsity of the return. Upon grounds of public policy, the return of the officer, even though not regarded as conclusive, should be deemed strong evidence of the facts as to which the law requires him to certify, and should ordinarily be upheld, unless opposed by clear and satisfactory proof. (*Jensen v. Crevier*, 33 Minn., 372; *Starkweather v. Morgan*, 15 Kan., 274; *Wade*, Notice, sec. 1380.)"

In *Randall v. Collins*, 58 Tex., this language occurs on page 232: "But assuredly if equity will allow one who has been guilty of no fault or negligence to contradict the sheriff's return by parol evidence, for the purpose of having an unjust judgment by default set aside, we are of the opinion that it should require the evidence to be clear and satisfactory. It is not like an ordinary issue of fact to be determined by a mere preponderance of testimony."

As to the effect of the appearance by Judge Lake, the following language quoted from *Winters v. Means*, 25 Neb., 242, is applicable: "Where the court acquires jurisdiction solely by the appearance of an attorney, the party for whom the appearance was made may, no doubt, deny the authority of such an attorney, and if the appearance was unauthorized, vacate the judgment. The want of authority, however, should be clearly made to appear, and particularly is this the case where the action is against a firm, one of whose members long afterwards seeks to escape liability

on the ground of want of such authority. The proof on this point is not satisfactory, and does not clearly show want of authority."

An abundance of authorities could be cited in support of this proposition stated by the present chief justice, but in the same measure as that statement is authoritative it is conclusive. The conclusions inevitably resulting in respect to the jurisdiction of the court are, first, that as opposed to the recitations of an officer as to the time and mode of service of summons, the evidence to overcome the same, must be clear and convincing; second, that where want of authority to appear is alleged as against such appearance by attorney, the burden of proof of such want of authority is upon the party asserting the same. In this case neither of these requirements were satisfactorily met, and it therefore results that after the lapse of these many years Augustus Graeter, Jr., and those claiming title under him, must be held concluded by the judgment of the court against him and by such proceedings thereunder as were duly had.

3. In the order of discussion laid down in the earlier part of this opinion the next question for consideration is, whether or not the power of attorney from Robert K. Wood to J. M. Woolworth so defectively described the subject-matter thereof that, thereunder, said attorney in fact could convey no title.

In said power of attorney said subject-matter was described as follows: "Sixty-three acres of land near Omaha, in Douglas county, in said territory, title to which was by said Woods acquired by sale thereof on execution against one Augustus Graeter and others." The deed executed by sheriff Grebe to J. M. Woolworth described the property as "the west half of the northwest quarter of section twenty-eight (28), in township fifteen (15) north, range thirteen (13) east of the sixth principal meridian, situate in said county of Douglas, excepting therefrom seventeen

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acres of said land, title to which never was in said defendants."

Appellants insist that the power to convey land must possess the same requisites as are necessary in the deed directly conveying the land, citing *Clark v. Graham*, 6 Wheat. [U. S.], 577, in support of this view. This principle is therefore accepted as correct, and we shall now examine the adjudicated cases confined as they are to deeds.

In Devlin, Deeds, sec. 1012, it is said that "the rule may be stated to be that the deed will be sustained if possible from the whole description to ascertain and identify the land intended to be conveyed."

Where the description alludes to facts beyond the deed, parol evidence may be offered, not to contradict the deed, but to locate the deed upon the land. (*Eggleston v. Bradford*, 10 O., 316.) It is undoubtedly essential to the validity of a conveyance that the thing conveyed should be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence. (*Stanley v. Green*, 12 Cal., 166.) As illustrative of the application of the principles above enunciated the following descriptions, and the opinions in which they have been approved, are set out: "All my right, title, and interest in and to any lands and tenements the title to which is in the said S. D. Munger, and in which I have any interest as being the wife of him, the said S. D. Munger." (*Munger v. Baldrige*, 41 Kan., 236.) "Also 960 acres of land, being the divided one-half of two tracts of land of 960 acres, out of patents 278, 279, granted by the state of Texas to A. B. Watrous, assignee of A. McDonald and J. Wishart, situate in Navarro county, Texas, on Richland creek, and set apart to George Butler by commissioners appointed by the district court of Navarro county March 19, 1869, recorded in county records, book D, p. 352." (*Harvey v. Edens*, 69 Tex., 420.)

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"That certain piece or parcel of timber land lying and being about forty-five miles in a northerly direction from the town of Eureka, * * * and the said timber land being known as McLeod Wood ranch, and containing about 500 acres, more or less." (*Paroni v. Ellison*, 14 Nev., 60.) "One hundred acres lying in Carrituck township, near the head of Smith creek, it being the easternmost portion of the farm purchased from my brother, and known as the Russel land." (*Warren v. Makeley*, 85 N. Car., 12.) "All the right, title, interest, and claim of the grantor in and to the farm of J. A., deceased, in W. township." (*Bailey v. Alleghany Nat. Bank*, 104 Pa. St., 425.) "All my right, title, and interest in Sacramento City, Upper California, consisting of town lots and buildings thereon." (*Frey v. Clifford*, 44 Cal., 342.) "All our right, title, and interest, and all real estate which we own or have claim to, situate in Belfast, situated in said county of Waldo, and particularly all that belongs to us as the heirs or legal representatives of Andrew Bird, formerly of Belfast, now deceased." (*Bird v. Bird*, 40 Me., 398.)

As was said in *Works v. State*, 120 Ind., 119, the true function of the description is not to identify the land but to furnish the means of identification, and this is done by the description here challenged. It furnishes the means of making the description certain, and that which can be made certain is certain. No question is raised as to the sufficiency of the description adopted by the attorney in fact in the deed by him as such executed, it therefore results from the foregoing considerations that the description of the subject-matter of said power of attorney must be deemed sufficient—the recital, that the title to the land had been by said Woods acquired by sale thereof, not being so misleading as to render inapplicable the principles above discussed.

The foregoing discussion covers all the questions which arose upon the record claim of title of each of the parties to this action. There was a large amount of evidence di-

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rected to the appellants' claims founded upon the occupancy, cultivation, use, and possession of the premises in dispute, but as these questions were settled as facts by the findings of the district court upon conflicting testimony, they must stand as should the special verdict of a jury on the same propositions. They, therefore, will not be inquired into in this court. In the district court the appellants were found entitled to one undivided fourteenth part of the lot in controversy, as to which finding no complaint is made by appellee. It was rendered unnecessary, therefore, to inquire into the derivation or history of this fractional interest, hence it has not before been referred to, or commented upon. From the foregoing considerations it results that the judgment of the district court is in all respects

AFFIRMED.

RAGAN, C., concurs.

IRVINE, C., as district judge, having passed upon another branch of this controversy, took no part in the consideration or decision of this case.

36	764
40	594
36	764
43	431

36	764
40	200
061	251

McCORD, BRADY & COMPANY V. PHILIP KRAUSE.

FILED APRIL 26, 1893. No 5091.

1. **Attachment: CHATTEL MORTGAGES.** In the action of an attaching creditor against the debtor, the validity of chattel mortgages made by the debtor to other parties cannot, as against such mortgagees, be adjudicated.
2. ———: **HEARING OF MOTION TO DISSOLVE: RIGHTS OF MORTGAGOR OF ATTACHED CHATTELS.** As between plaintiff and defendant alone, upon motion to dissolve an attachment of the chattels mortgaged, the defendant can be heard only because of his residuary, contingent interest which may remain after the said mortgages are satisfied.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

Jeffrey & Rich, for plaintiff in error.

Byron Clark, *contra*.

RYAN, C.

On August 14, 1891, Philip Krause, a merchant at Plattsmouth, Nebraska, made the first mortgage herein-after referred to, and on the 15th day of August, 1891, made the other chattel mortgages in the order given, upon the entire merchandise composing his stock of goods, to secure severally the parties and amounts following, to-wit: Bank of Cass County, \$1,000; Meyer & Raapke, \$330.73; Tootle, Hosea & Co., \$677.82; D. M. Steele & Co., \$311.37; McCord, Brady & Co., \$331.67; Kasper Bros., \$354.35. These mortgages practically covered all the possessions of defendant Krause, and each provided that it was "lawful" for the mortgagee to take immediate possession of said goods and chattels wherever found, the possession of these presents being his sufficient authority therefor, and to sell the same at public auction or private sale, or so much thereof as shall be sufficient to pay the amount due or to become due," etc. After reciting the statutory provision for advertising the sale, each mortgage provided for sale without notice at continuous private sale at option of the mortgagee. Each mortgagee, through W. H. Miller, as agent, upon the making and filing of said mortgages went into possession, and private sales of the stock began under the provisions aforesaid.

It is a disputed proposition whether or not the plaintiff in error McCord, Brady & Co. accepted the mortgage in favor of that firm. Certain it is, however, that on August 24, immediately following the making of said mortgage, the plaintiff in error repudiated the same by attaching the

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mortgaged property in this suit brought in the district court of Cass county. The petition and affidavit for an attachment were in due form for the indebtedness not yet due, as well as for a part already due, and there was on the same day made by the presiding judge of said district court the following order:

"On application of the plaintiff, and it appearing from the affidavit of the plaintiff that the claim is just and that there is cause for granting an attachment, an order of attachment in the sum of \$396.56, and \$50, probable costs of the action, is therefore allowed to issue in this case, upon the plaintiff giving an undertaking in the sum of \$800, with approved security as provided by law.

"(Signed)

SAMUEL M. CHAPMAN,

"Judge of the District Court."

An undertaking was filed as required by this order, and duly approved, whereupon an order of attachment issued against the property of defendant Krause, and was at once levied on the mortgaged property by the sheriff of said county, in whose possession said property remained, at least until after the dissolution of the attachment.

W. H. Miller, on the hearing and determination of the motion hereinafter referred to for the dissolution of the attachment, in his affidavit, stated that on August 15 he was by the mortgagees put in possession of the mortgaged property with instructions to remain in possession of said goods for all of said parties until their respective claims were paid out according to the priority just stated, and accordingly proceeded to sell the mortgaged property at retail without advertising; that at the time of the levy he had collected on the books of account and so sold goods to the aggregate amount of \$447.93, to apply on the mortgage of the bank of Cass county. This agent, W. H. Miller, further stated that at the time the said goods were attached he informed the sheriff, prior to the levy, that he was in possession of said mortgaged property for the mort-

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gagees, giving him a list of the names hereinbefore set forth, and surrendered said goods and chattels under protest.

Neither of the mortgagees have in any way attempted further to assert a right to the possession of the property levied upon, and to this action neither has been a party nor in privity, so far as the record discloses, with the defendant in resisting the attachment upon these goods. This is very important, for our consideration of this case is thus limited exclusively to a determination of the rights and remedies proper as between plaintiff and defendant as debtor and creditor. Whatever rights or remedies the mortgagees may have in respect to the mortgaged property are in no way determined in this proceeding, because impossible in their absence as parties, and upon the record unnecessary.

On August 29, 1891, the defendant in said attachment proceedings filed in said court a motion to vacate and discharge said attachment on various grounds, only two of which are deemed important to the proper decision of the matters presented for review. This motion was presented upon affidavits of various parties, with which were presented several chattel mortgages containing the provisions above recited. A clear preponderance of the evidence showed that these mortgages covered all of Krause's property, and that he admitted to plaintiff's agent and to plaintiff's attorney that these mortgages were given to satisfy his largest creditors so they would not attach, that the smaller ones would not attach, and that he intended to settle with his creditors; though the defendant denies making the statements. Upon this motion the following order was made:

"And now on this 7th day of November, 1891, this cause came on for hearing upon the motion of the defendant to vacate and discharge the attachment heretofore granted in this cause and was submitted to the court, on consideration whereof it is ordered that the attachment heretofore granted in this action be and the same is vacated and discharged, and the sheriff is required to return to the

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defendant all the property taken by him under said order of attachment; to all of which the said plaintiff duly excepts, and plaintiff is granted twenty days in which to perfect exceptions and prepare and file petition in error in supreme court."

As between plaintiff and defendant, the only parties to this litigation, the learned district judge erred in making the above order dissolving the attachment and returning the property attached to the defendant Krause. The question was simply whether or not sufficient grounds of attachment existed as against Krause. He had disposed of all the property, and, as he admits in his own affidavit, was slightly insolvent, the parties to whom his property was turned out were authorized to and in pursuance of this authority in fact were disposing of Krause's property at retail by private sales. Chapter 12 of the Compiled Statutes of Nebraska prescribes the manner in which chattel mortgages may be foreclosed. It is not deemed necessary to decide at present whether an advertisement and public sale is absolutely essential to a foreclosure as against creditors of the mortgagor; suffice it to say that a mortgagor who consents to a private sale of all his property, though under the guise of a chattel mortgage, to prevent large claim holders from bringing suit, with a view to settling with his creditors, is not in a position to insist that said property shall not be attached at the suit of one of his creditors. (*Wyman v. Mathews*, 53 Fed. Rep., 678.) His interest in the attached property is limited to such residue as may remain after the mortgages are fully satisfied, and as to such interest defendant's conduct and standing are not such that upon his application the attachment should have been dissolved. The order of dissolution of the attachment is therefore vacated, and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other commissioners concur.

ISABEL WAGNER V. B. B. HAINES.

FILED APRIL 26, 1893. No. 4586.

Forcible Entry and Detainer: INSTRUCTIONS. In an action for the recovery of possession of farm lands and a dwelling house from defendant's alleged forcible detention of both conjunctively, plaintiff's request for an instruction which defined the rights of defendant to the whole subject of controversy, as though to be tested by his right to the possession of the dwelling house alone, was properly refused.

ERROR from the district court of Gage county. Tried below before BROADY, J.

Griggs & Rinaker, for plaintiff in error.

R. S. Bibb, contra.

RYAN, C.

The plaintiff in error brought an action before a justice of the peace of Gage county against the defendant in error, alleging plaintiff's present right of possession as against the defendant, who unlawfully, as plaintiff alleged, held possession of certain real property. Upon appeal to the district court of that county a verdict was returned and judgment rendered in favor of the defendant.

There was not much conflict as to the facts, though not all detailed by any one witness. About August 30, 1889, plaintiff agreed to lease the real property in question to the defendant for a term of three years. Afterwards, in October, defendant, with his family, at the suggestion of plaintiff, moved into the dwelling house occupied by plaintiff, and began preparation for cropping next year the land of which the right of possession was litigated afterwards. For this purpose the defendant plowed from twelve to fourteen acres some time in the fall of 1889. No attempt

Wagner v. Haines.

was made to reduce the terms of the lease to writing until December of that year, when the plaintiff caused a draft of the lease, as she understood it, to be prepared. The defendant refused to sign this because its terms were not in all respects as he understood those agreed upon in August preceding, and the parties were never able to formulate in writing a common understanding of the terms of the lease. In March, following, this action was begun. The theory of the plaintiff was that the transaction had in August was merely an agreement to execute a lease at a subsequent date, while defendant just as strenuously insisted that it was a lease *in presenti*; the requirement of a writing for a term of more than one year to be met by subsequently reducing to writing and signing the terms agreed upon.

The necessity of considering the merits of these claims arises only upon the instructions given and refused. The court instructed the jury that a parol lease for more than one year is not good for more than one year, but is good for one year; also as follows:

"3. An agreement to enter into a written contract of lease is not a lease; but a parol lease, with a further agreement to reduce the terms of the parol lease to writing, is a lease so far as it is competent to make a parol lease. This is a distinction you will bear in mind in considering this case. The defendant claims under a parol lease; the plaintiff claims that there was no parol lease. This is a controlling question of fact for you to determine; that is whether or not the defendant was in possession of the premises under and by virtue of a parol lease from the plaintiff at the commencement of this action."

Plaintiff in error does not question the correctness of this instruction so far as it goes, but insists that the following instruction upon her request should have been given the jury:

"2. You are instructed that if you find from the evi-

dence that it was agreed between the parties that a lease should be executed to commence March 1, following, and that plaintiff allowed the defendant to go into a part of the house prior to said March 1, then the plaintiff had a right to make defendant vacate said premises at any time prior to said March 1, and recover possession thereof; and after the defendant had been notified to leave said premises he was a wrong-doer, as he had no right to remain there after such notification."

This instruction by its terms was limited to "a part of the house," as "the premises," in regard to which alone the right of possession was to be determined by the jury. The petition upon which the cause was tried claimed the right of immediate possession of the northwest quarter of section 19, town 4, range 6, conjunctively with the dwelling house; its prayer was for the restitution of said premises. Manifestly this instruction, which ignored the rights of the defendant as to the tillable land of which he had already plowed twelve or fourteen acres for the following year's crop, was, in an action of this character, too restricted in its scope, and plaintiff's request to so instruct was therefore properly denied. The record presents no other question than upon the instructions; it therefore results that the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

SIMON OBERNALTE V. JAMES JOHNSON.

FILED APRIL 26, 1893. No. 4989.

36	772
60	556
36	772
62	127

1. **Malicious Prosecution: PLEADING.** O. charged J. before a justice of the peace with the commission of a criminal offense. The jury found J. not guilty, and made a special finding in these words: "and that the complaint was made without probable cause." J. then sued O. for damages, alleging that the prosecution was malicious and without probable cause, and set out in his petition the special finding of the jury. *Held*, That it was error to overrule O.'s motion to strike such special finding out of the petition.
2. ———: **EVIDENCE.** On the trial J. offered in evidence the verdict of the jury acquitting him of the offense with which O. charged him before the justice of the peace. *Held*, That that part of the verdict acquitting him was competent, although O.'s answer admitted that J. had been tried and acquitted. *Held further*, That it was error to permit the said special finding to be read in evidence to the jury.
3. ———: ———: **HARMLESS ERROR.** The foregoing errors were, however, cured by the instructions of the court, and in this case were held to be without prejudice.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

J. H. Haldeman, for plaintiff in error.

Wooley & Gibson, *contra*.

RAGAN, C.

James Johnson sued Simon Obernalte in the district court of Cass county for damages for malicious prosecution, alleging that on the 2d day of September, 1889, Obernalte falsely and maliciously, and without probable or reasonable cause, charged the plaintiff before a justice of the peace with a crime, and caused said justice to make out a warrant and arrest the plaintiff, by which he was deprived of his lib-

erty; that on the 5th of September, 1889, the plaintiff was tried on the charge before said justice of the peace and acquitted, and that said prosecution is now ended and wholly determined; that by means of said false arrest, trial, and imprisonment, the plaintiff had been damaged. Petition also contained this clause: "And the jury in said cause found the complaint was made without probable cause." To this petition the defendant below filed a motion to strike out the words: "And the jury in said cause found said complaint was without probable cause." This motion the court overruled. The defendant then answered, admitting that he made the complaint before the justice of the peace, had the plaintiff arrested as alleged in the petition, and averred that the charges made against the plaintiff were true; that in the month of August or September, 1889, he was reliably informed that plaintiff was guilty of the offense with which he charged him before the justice of the peace; that he consulted the county attorney and truthfully laid all the facts before him, and thereupon caused the plaintiff to be arrested, and denied "that such arrest was made through malice or without probable cause, and denied that plaintiff had been damaged thereby." There was a trial to the jury, with a verdict and judgment for Johnson, and Obernalte brings the cause here for review.

There are only three assignments of error which we notice:

1. The overruling of the motion of the defendant below, to strike out of plaintiff's petition the words: "And the jury in said cause found said complaint was made without probable cause." This motion should have been sustained. It was not a material allegation in the petition, and no evidence could be adduced on the trial in support of such an allegation.

2. The introduction in evidence of the verdict of the jury in the criminal trial before the justice of the peace. This verdict was in these words:

Obernalte v. Johnson.

"In Justice Court, before L. C. Stiles, Justice of the Peace.

"THE STATE OF NEBRASKA
v.
JAMES JOHNSON, CHRIS NELSON. } Verdict.

"We, the jury, duly impaneled and sworn in the above entitled cause, do find the defendants not guilty, and that the complaint was made without probable cause.

"C. H. SMITH,
"Foreman."

It is true the answer of the defendant admitted that he had caused Johnson's arrest, that he had been tried and acquitted. Nevertheless, that part of this verdict finding Johnson not guilty was competent evidence, but the words "and the jury in said cause found said complaint was made without probable cause" were clearly incompetent. The very question the jury, to whom this verdict was read in evidence, was sitting to determine was whether Obernalte, in the prosecution of Johnson in the case wherein the jury had acquitted him, had probable cause to believe him guilty of the offense with which he charged him before the justice of the peace, or whether his prosecution of Johnson was malicious and without probable cause. To permit this part of the verdict to be read was in effect to put in evidence against Obernalte the opinion of the jury-men in the state case that in causing Johnson's arrest Obernalte was actuated by malicious motives. We know of no rule of evidence under which that part of the verdict was competent, and it should have been excluded. (*Sweeney v. Perney*, 40 Kan., 102.)

3. The giving of instruction No. 8 by the court. That instruction is as follows: "The record and verdict of the criminal trial had before Justice Stiles, and which has been received in evidence before you, are proper to be considered by the jury only so far as it tends to show the institution and final determination of said criminal prosecution in the

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court below." We do not think there was any error in this instruction. On the contrary, if it was out of the record, the case would have to be reversed. The court by giving it cured the other errors complained of and reviewed herein.

The plaintiff in error assigns as error the giving of other instructions by the court, but these are not insisted on in the brief of counsel. We have, however, carefully examined them and think the plaintiff in error has nothing of which to complain. The trial judge seems to have taken great pains to fully, fairly, and carefully instruct the jury on all the points in the case. The judgment of the court below is

AFFIRMED.

THE other commissioners concur.

LUELLA GILLESPIE ET AL., APPELLEES, V. PHILIP H.
COOPER ET AL., APPELLANTS.

FILED APRIL 26, 1893. No. 4794.

1. **Creditor's Bill: STATUTE OF LIMITATIONS.** Under section 12, Civil Code, an action for relief on the ground of fraud can only be commenced within four years after a discovery of the facts constituting the fraud.
2. ———: ———: **FRAUDULENT CONVEYANCES: ATTACHMENT OF PROPERTY FRAUDULENTLY CONVEYED.** The cause of action mentioned in said section is the fraudulent act complained of; and the cause of action accrues when discovered, and it is discovered when the party seeking relief is in possession of sufficient facts to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to a discovery of the fraud; and the statute begins to run against a creditor from the discovery of the fraudulent act on the part of his debtor, whether the creditor's claim has been reduced to

36	775
43	330
36	775
49	311
36	775
158	143

Gill spile v. Cooper.

judgment or not, as he is not limited to a creditor's bill in order to obtain relief on the ground of fraud, but may attach the property fraudulently conveyed. IRVINE, C., dissents.

3. ———: ———: ———: DISCOVERY OF FRAUD BY CREDITOR.

A party defrauded must be diligent in making inquiry. Means of knowledge are equivalent to knowledge. A clue to the facts which, if followed up diligently, would lead to a discovery, is, in law, equivalent to a discovery. Accordingly, where a party was known by her creditors to have recently failed in business and to be insolvent, conveyed all her real estate by deed recorded October 23, 1884, in the county where she resided; and she, in conversation with her creditors at that time, said that the object of the conveyance was to beat her foreign creditors; that she had been advised to put her property out of her hands; that she intended to put her property in other hands until she could settle matters; that she had made arrangements by which she could pay all her home creditors; that there were some debts she did not feel bound to pay; that the object of the deed was to secure a debt to the grantee, and the surplus to be paid her; it was *held*, that these facts were a discovery by the creditors on the date of the recording of said deed that the same was fraudulent.

4. ———: ———: ———: ———: REGISTRATION OF FRAUDULENT

DEED. It seems that the fraud, within the meaning of said section 12, is discovered when the fraudulent deed is recorded in the county where the debtor lives.

5. ———: ———: ———: ———. On the 28th day of October,

1884, C., being largely indebted to various parties, conveyed all her property, four city lots, to one R., with a secret agreement between them that R. should sell the lots and retain the amount of the debt owing him by C., and return the surplus property, or proceeds thereof, to C., or such person as she might designate. *Held*, That this was a fraud on the other creditors of C., but, as this fraudulent conveyance was discovered by them on the date of its record, their suit to set it aside, commenced more than four years thereafter, was barred; but where it also appeared that while R. held the title to the said four lots, he agreed with C. that if she would find a purchaser for, or sell them, he would pay her, as commissions, all that remained of the lots or their proceeds after the payment to him of her debt. Two of the lots were sold, R.'s debt paid, and at C.'s request the remaining two lots were conveyed to her husband without consideration. *Held*, That the two lots thus conveyed were C.'s property, acquired from R. by purchase, and were conveyed to C.'s husband for the purpose of defrauding her creditors. *Held further*, That this was

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not a continuation or consummation of the fraud of October 28, 1884, but a new and independent one, and as the suit of C.'s creditors to set aside the conveyance of October 28, 1884, also assailed this conveyance of the two lots purchased by C. from R., and conveyed to her husband, and was commenced within four years of the recording of such conveyance, it was not barred as to the lots purchased by C. of R.

APPEAL from the district court of Lancaster county.
Heard below before CHAPMAN, J.

Lamb, Ricketts & Wilson, for appellants.

Harwood, Ames & Kelly, Stevens, Love, Cochran & Tedders, and *W. S. Summers*, for appellees.

RAGAN, C.

In 1883 the appellant Sarah Cooper was the owner of lots Nos. 4, 5, 6, 7, 8, and 9, in block No. 124, in the city of Lincoln, and, together with her husband, the appellant Philip H. Cooper, occupied of said lots as a homestead Nos. 8 and 9. Mrs. Cooper was engaged in the mercantile business, and about October 1, 1884, failed, owing appellees debts contracted on the faith and credit of her property and business. On January 8, 1883, Mrs. Cooper conveyed by quitclaim deed said lots Nos. 8 and 9 to the State National Bank of Lincoln, to secure the payment of a debt she owed it. On January 7, 1884, she was still indebted in the sum of \$4,500 to said bank, as an evidence of which said debt she executed and delivered to it her note due in sixty days, on which, prior to October of said year, there were indorsed \$1,300. At this date all these lots were incumbered by a mortgage of \$3,500, held by one Bowles. On October 27, 1884, Mrs. Cooper and her husband, by a warranty deed, and for the expressed consideration of \$5,200, conveyed to John R. Richards, then president of said bank, four of said lots, namely, Nos. 4, 5, 6, and 7. This deed contained this clause: "The party

of the second part, as a part of the purchase money of said premises, agrees to pay and have applied on a certain mortgage executed by the parties of the first part to one Kate Bowles the sum of \$2,000, and which said mortgage also covers lots 8 and 9 in said block, and is to secure \$3,500, and is recorded in book V of mortgages, in Lancaster county, Nebraska. The balance of said mortgage, being \$1,500 and interest, the parties of the first part are to pay, and if not paid and is enforced by foreclosure, said lots Nos. 8 and 9 are to be first sold and the proceeds to be applied to the payment of said balance of \$1,500 and interest." On the day of the execution of this deed to Richards the State National Bank executed and delivered to Mrs. Cooper a quitclaim deed for the said lots Nos. 8 and 9 previously conveyed by her to the bank as security.

The deeds of Mrs. Cooper and husband to Richards, and from the bank to Mrs. Cooper were both recorded October 28, 1884. About this last date Mrs. Cooper and husband conveyed said lots Nos. 8 and 9 to one Hyde, and he at once conveyed them to appellant Philip H. Cooper, who thereupon gave his wife a written receipt, or paper reciting that he accepted said conveyance from Hyde in full payment of \$1,300 before then loaned by Mr. Cooper to his wife, and agreeing to hold said lots as the homestead of the family. It appears that this \$1,300 was the money indorsed on the \$4,500 note.

Some time after the date of the deed from Mrs. Cooper and husband to Richards he was succeeded as president of the bank by one Brown, and at that time Mr. Richards conveyed said lots Nos. 4, 5, 6, and 7 to him, Brown. About April 1, 1886, Mr. Brown sold and conveyed two of said lots, namely, lots Nos. 4 and 5, to one Patrick for \$4,500; and, on April 14 of the same year, Brown conveyed to appellant Philip H. Cooper the other two lots, namely, lots Nos. 6 and 7, the consideration expressed in the deed being one dollar.

Gillespie v. Cooper.

The appellees brought this suit, a creditor's bill, in the district court of Lancaster county, alleging their judgments against Mrs. Cooper; that the debts on which they were based were contracted while she was owner of the record title of said lots Nos. 4, 5, 6, 7, 8, and 9, and on the faith and credit of the same; her insolvency; that said lots Nos. 8 and 9 were of the value of \$9,000, the homestead of herself and husband; that they had conveyed them to Hyde and caused him to convey them to Philip H. Cooper without consideration and for the express purpose of defrauding the creditors of Mrs. Cooper. As to said lots 4, 5, 6, and 7, appellees in their amended petition alleged that on October 27, 1884, the appellant Mrs. Cooper was indebted to the State National Bank of Lincoln in the sum of \$3,200, and to secure the payment of the same she and her husband conveyed all said lots to said Richards, president of said bank, and that it then was, and at all times prior and subsequent thereto continued to be, well understood and agreed by and between the said Coopers and the said Richards and the bank of which he was president that Richards received said deed and the title to said lots in trust only and by way of mortgage to secure an indebtedness of \$3,200 from the said Sarah Cooper to said bank, and that upon the payment of said indebtedness, said lots should be reconveyed to the said Sarah Cooper or to such person as she might direct; or that in case said lots should be sold, that the bank should be first paid out of the proceeds of the sale, and the residue, if any, should be paid over to the said Sarah Cooper, or to such person as she might direct.

Appellees further alleged that some time after that one Brown succeeded Richards as president of said bank, and that thereupon Richards conveyed said lots to Brown on the same terms under which they were conveyed to him by the Coopers, and that, in pursuance of the trust and agreement between the said Coopers and the said Richards

Gilesple v. Cooper.

and Brown and the bank, in April, 1886, Brown sold of said lots Nos. 4 and 5 to one Patrick for a sum of money sufficient to pay the indebtedness of Mrs. Cooper to the bank, and did, with the proceeds of said sale, pay off and discharge Mrs. Cooper's indebtedness to the bank; and thereupon, on the 14th of April, 1886, at the request of Mrs. Cooper, and with the intention to hinder, delay, and defraud her creditors, and without consideration, conveyed said lots Nos. 6 and 7 to the appellant Philip H. Cooper. The appellees further alleged that they had no knowledge of the facts set forth in their amended petition as to the fraudulent intent and purpose of the conveyance of the lots by the Coopers until long after said conveyance. The prayer was that all of the conveyances, so far as the same affected said lots 6 and 7, be set aside, canceled, and annulled.

The answer of the appellants alleged that as to lots 8 and 9 they were conveyed to the appellant Philip H. Cooper, in consideration of the \$1,300 which he had loaned his wife, and which she had paid on the note held by the State National Bank. As to lots 4, 5, 6, and 7, the answer alleged that the deed made by the Coopers of said lots to Richards on the 27th of October, 1884, was an absolute sale and conveyance of the property, and made in good faith. The appellants also pleaded the statute of limitations, viz., that the cause of action of the appellees accrued more than four years prior to the bringing of this suit.

The judgment of the court, found in the record, makes no disposition whatever of said lots Nos. 4, 5, 8, or 9. The court found and decreed, however, that the conveyance made by the Coopers on the 27th of October, 1884, to Richards of lots 4, 5, 6, and 7 was made to secure the payment of \$3,200, then owing by Mrs. Cooper to the State National Bank, and in trust for Mrs. Cooper, with an agreement on the part of Richards that after the debt was paid the remaining property, or the proceeds of the

sale of the property, if it should be sold, should be returned to Mrs. Cooper, or to such person as she might designate; and that both the conveyance of October 27, 1884, of Coopers to Richards, and the conveyance of April 14, 1886, of Brown to appellant Philip H. Cooper, were made for the purpose of hindering, delaying, and defrauding the creditors of Mrs. Cooper, and the court decreed that the said conveyance of April 14, 1886, by Brown to Cooper be set aside, and the property subjected to the payment of the debts of appellees. The court further found that the appellees were ignorant of all said fraudulent transactions and agreement and intent until within four years prior to the bringing of this action.

The appellants filed the usual bond in the court below and bring the case here on appeal.

The finding of the court, that the conveyance made by the Coopers to Richards on the 27th of October, 1884, and the subsequent conveyance of Brown to Cooper in April, 1886, were fraudulent and made for the purpose of hindering and delaying the appellees in the collection of their debts, is supported by the evidence. But we are of the opinion that the finding of the court, that the appellees were ignorant of both these fraudulent transactions until within four years next prior to the bringing of their suit, is not supported by the evidence in the record. This suit was brought more than four years after October 28, 1884. Now, when did appellees discover the fraud perpetrated October 27, 1884, within the meaning of section 12 of the Civil Code, as construed by the courts?

The parties all lived in the city of Lincoln, in Lancaster county, Nebraska. The lots fraudulently conveyed were situate in said county and city. The fraudulent deed was recorded in said county and city October 28, 1884. Mrs. Cooper had failed in business and was known to be insolvent. The fraudulent grantors remained in possession of the property conveyed to Richards. The appellees testify:

Mrs. Gillespie:

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. Are you acquainted with the defendants Cooper and his wife?

A. Yes, sir.

Q. How long have you known them?

A. I should say about fourteen years.

Q. Did you know or hear about the conveyance of Coopers to J. R. Richards?

A. Yes, sir; I did.

Q. Of the property in question in October, 1884?

A. Yes, sir.

Q. At that time Mrs. Cooper then was or had been in the grocery business?

A. Yes.

Q. It was about the time of the failure of that business, was it not?

A. Yes, sir.

Q. At or about that time, or immediately afterwards, did you have any conversation with Mrs. Cooper in reference to the transaction?

A. Yes, sir.

Q. State when and where that conversation was.

A. It was at Mrs. Cooper's house.

Q. On what date?

A. I could not say the date.

Q. With relation to the transaction, on what date?

A. It was the day that those deeds were to be made. I met her son and I think the attorney—I was not acquainted with the gentleman—as I went up.

Q. Was that this gentleman, Mr. ———.

A. I could not identify him now, but she told me that Mr. ——— had advised her to deed the property out of her hands.

Q. Where did that conversation occur?

A. At Mrs. Cooper's house.

Q. Did you have any further conversation with her at that time and at that place?

A. Yes, sir; she asked me if I had taken any action in the matter as soon as I went in, and I told her no; that I called to see her to see what she had to say about it, and she said they intended putting the property into Mr. Richards' hands until they could settle the matter and straighten themselves. She said of course she intended to pay me and she said she intended to fix it so the creditors of Willie could not get hold of it. And she said when that property was sold Mr. Richards had entered into an agreement with her that she would have all over and above her indebtedness to Mr. Richards, and that she would have ample means to pay all her debts of honor, as she termed them, when that was fixed up.

Q. Willie was her son?

A. Yes, sir.

Q. He had been conducting her business in the grocery?

A. Yes, sir; he had been conducting the grocery business.

Q. That was the business that failed about that time?

A. Yes, sir.

Q. That business was conducted in her name—it was her business?

A. Yes, sir; that was my understanding.

J. H. McClay:

Q. Where do you reside?

A. Lincoln.

Q. Are you acquainted with the defendants?

A. Yes, sir.

Q. You are one of the plaintiffs in this action?

A. Yes, sir.

Q. You may state whether you had any conversation with the defendants, or either of them.

A. I have had conversation with them at different times

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about this matter. I have had conversation with Mrs. Cooper in reference to this matter in controversy.

Q. State when and where they were and what they were.

A. Very soon after her failure and the transfer of this property in these deeds offered heretofore.

Q. What was said?

A. It was after the quitclaim deed and prior to the 1884 deed; it was between that time; it was just after the failure of the grocery business that I had the conversation.

Q. Fix the date.

A. I could not do that. It was just after the failure of the grocery business. My conversation with Mrs. Cooper was about some money that she owed me that I had paid as security on a note, and she said she had made arrangements by which she could pay all her debts to the people here in Lincoln; that there were some debts that she did not feel bound to pay; she had plenty of property to pay them with. I asked her where the property was. She refused to tell me where it was. She said she had made such arrangements as would protect her interests and she thought it would protect the rest of us.

W. W. Holmes:

Q. You are one of the plaintiffs?

A. Yes, sir.

Q. You live in Lincoln?

A. Yes, sir.

Q. You are acquainted with the defendants?

A. Yes, sir.

Q. You have heard the testimony in this case so far?

A. Yes, sir.

Q. Did you at any time, about the time of the transfer or conveyance of these lots to Richards, have any conversation with the defendants, or any of them, in reference to it?

A. I had with Mrs. Cooper.

Q. When?

A. It was on Monday following the conveyance.

Q. What day of the week were the conveyances, do you know?

A. She said she had been up all night Sunday night making them.

Q. It was the day following that you had that conversation with her?

A. Yes, sir.

Q. Where was that conversation?

A. At her house.

Q. What was it?

A. She said she had turned the property over to Richards to beat her foreign creditors, and all the home creditors were to be paid.

Q. Was there any further conversation?

A. Yes, sir; I had a long conversation with her.

Q. State the substance of it as near as you can.

A. I don't know as she said anything more about that. She said she was most sick, she had been up all night.

Q. Did she say what the object of the transfer to Richards was, what office that was intended to perform?

A. It was to secure the bank; the bank was to be paid first.

Q. What was to become of the residue?

A. That was to go to her.

J. H. McClay recalled:

Q. Did you have any such conversation as that with Mrs. Cooper?

A. Yes, sir; I had that kind of a conversation with her, and she told me that the lands were hers after the bank had been paid off—the State National Bank was paid—the balance belonged to her.

Were these facts a discovery by appellees of the fraud of October 27, 1884, within the meaning of section 12 of the Civil Code and the construction placed thereon by the courts? Part of that section is as follows: "An action for

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relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." The settled rule is that the party defrauded must be diligent in making inquiry; that means of knowledge are equivalent to knowledge; that a clue to the facts, which, if followed up diligently, would lead to a discovery, is in law equivalent to a discovery, equivalent to knowledge. (*Norris v. Haggin*, 28 Fed. Rep., 275, and cases there cited; *O'Dell v. Burnham*, 61 Wis., 562; *Kuhlman v. Baker*, 50 Tex., 630.)

In *Parker v. Kuhn*, 21 Neb., 413, this court said: "An action for relief on the ground of fraud may be commenced at any time within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery."

Hellman v. Davis, 24 Neb., 793, was a creditor's bill, alleging that in 1873 the defendant was a member of an insolvent copartnership, and on said date caused certain lands to be purchased with his money and title taken in his wife's name for the purpose of defrauding his creditors; that the plaintiff had no knowledge of the fraud until within four years prior to the bringing of the suit. It appears from the evidence quoted in the opinion that the fraudulent deed was recorded in 1873; that the plaintiff knew that the defendant and his wife were living on the land, and that the defendant was insolvent, and the only other fact of the fraud that plaintiff had learned since its perpetration was that within four years before the suit was brought his attorney had told him his claim against the defendant could be made. Justice COBB, speaking for this court, with those facts before him, held that the action was barred by the statute of limitations, citing and affirming *Parker v. Kuhn*, 21 Neb., 413.

In *Wright v. Davis*, 28 Neb., 479, a creditor's bill, it was alleged that the defendant became indebted to the

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plaintiff in the year 1868; that the plaintiff's claim was reduced to judgment, became dormant, and was revived in 1885; that the defendant, about the date of the incurring of the indebtedness, contemplated utter insolvency, and with a view to defraud his creditors purchased certain real estate with his own money and caused the title to the property to be taken in the name of his wife; that subsequently, in 1879 and 1880, she conveyed the real estate to certain other persons, and they afterwards reconveyed the same to her; that such conveyances by her and to her were made for the purpose of covering up and hiding the title, and that during all these times the defendant was the sole owner of the real estate. The plaintiff also alleged that aside from what was shown by the records of Douglas county, the fraud was discovered and made known to plaintiff within a year prior to the bringing of the suit, and not before, and that the cause of action accrued upon the discovery of the fraud. The plaintiff on the trial testified:

Q. You knew this land had been bought and stood in the name of Mrs. Davis?

A. I presume I did. I don't think I ever looked at the records, but I was satisfied that was the case.

It also appears that he testified on the trial that he had seen the defendant frequently after the recovery of his judgment, had conversed with him about the payment of it, had received assurances that it would be paid, and that he was to be taken care of. Chief Justice REESE, speaking for this court with these facts before him, said: "There is no question but that the plaintiff's right to apply the property to the payment of his claim was barred by the statute of limitations if the statute began to run upon the filing for record of the deed by which the real estate was finally conveyed to Mrs. Davis, for by section 12 of the Civil Code the statutory limit is four years after the discovery of the fraud." He then cites *Helman v. Davis*, *supra*, and *Parker v. Kuhn*, *supra*, and continues: "By

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these cases it is pretty well settled in this state that while a person against whom a fraud has been perpetrated has four years from the discovery of the fraud in which to commence his suit, yet the fraud will be deemed to have been discovered when such facts are known, either actually or constructively, as would amount to knowledge, or which would naturally suggest such inquiries as, if followed up, would lead to such knowledge. * * It clearly appears that the conveyances were made and placed on record at a time when the defendant was known to be insolvent; that defendant resided upon the land and made improvements thereon; * * * that it was claimed by some of the (defendant's) family and was charged by the record with knowledge of the condition of the title as it then appeared. * * * It appears from all the evidence that the plaintiff was fully aware of the financial condition of the defendant, and that the conveyances to his wife could not be otherwise than fraudulent. Or, if this cannot be said to have been fully established, that by the most superficial examination, suggested by facts within his knowledge, he might have had full and complete knowledge of the condition of the title. * * * This was sufficient to cause the statute to run."

In *Laird v. Kilbourne*, 70 Ia., 83, the supreme court of Iowa say: "An action to set aside a fraudulent conveyance of real estate is barred in five years after the fraud is discovered, and it is conclusively presumed to be discovered when the fraudulent conveyance is filed for record." (See also *Humphreys v. Mattoon*, 43 Ia., 556.)

In *Rogers v. Brown*, 61 Mo., 187, the supreme court of Missouri say: "They (the appellees) are chargeable by law with notice of the recorded conveyance. * * * The statute must be held to have commenced to run against them on the 26th day of October, 1857, the day on which the deed was recorded."

In *Cockrell's Ex'r v. Cockrell*, 15 S. W. Rep., 1119, a creditor's bill, the supreme court of Kentucky say: "The

statute of limitations was pleaded and the reply attempted to avoid it by saying that the appellant * * did not know that the deed was made and recorded. This is no excuse for the delay, and besides the land was conveyed and the deed recorded in the county where the debtor lived, and where the suit was instituted, and all the party had to do was to examine the county records, and there the deed could have been found."

The foregoing facts, looked at in the light of the authorities just quoted, were sufficient to put appellees on an inquiry, which, if pursued, would have led to the discovery of the fraud in the conveyance by the Coopers to Richards, and appellees must be held to have discovered that fraud October 28, 1884. The statute then began to run in favor of Mrs. Cooper's grantees and against her and her creditors.

Appellees, however, claim that their cause of action did not accrue until they recovered their judgments against Mrs. Cooper. What was appellee's cause of action? Evidently the fraudulent conveyance between the appellants. When did it accrue? When *discovered*, and it was *discovered* when appellees were in possession of sufficient facts to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would have led to the discovery that the conveyance to Richards was fraudulent. What facts were in possession of appellees October 28, 1884? The fraudulent conveyance from the Coopers to Richards was of record. The appellees and appellants all resided in the same county and city. Appellees knew that Mrs. Cooper had failed in business and was insolvent. The appellees knew that the Coopers continued in possession of the property conveyed to Richards. Appellees had been told by Mrs. Cooper that she had conveyed her property to Richards to defeat her creditors, or some of them. These facts were sufficient for appellees to have maintained an attachment suit against this property October 28, 1884, whether their claims against her were due

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or not, and their right to relief against this fraudulent conveyance was an accrued right when they could, by *any form of action*, set the courts in motion to relieve them from this fraud.

Were the appellees limited to a *creditor's bill* in order to obtain relief from this fraudulent conveyance? We think not. Appellees could have attached the property on the ground that it was fraudulently conveyed to Richards for the purpose of delaying Mrs. Cooper's creditors. (Civil Code, sec. 198, subd. 8; *Keene v. Sallenbach*, 15 Neb., 200; *Brown v. Brown*, 11 S. W. Rep. [Ky.], 4; *Rogers v. Brown*, 61 Mo., 187.)

For this court to hold that appellees' cause of action did not accrue—the fraud discovered—until appellees were in a position to file a creditor's bill, would be to judicially amend this statute and leave it to the discretion of creditors to fix the time of the accrual of their cause of action by hastening or delaying the recovery of judgment. A case might arise where, by reason of the debtor being a non-resident, a personal judgment could not be obtained. In such case would appellees have no cause of action for relief on the ground of fraud until the debtor became a resident and a personal judgment was rendered against him? It is an old maxim that for every wrong the law affords a remedy, but if one effectual remedy is afforded by the law the maxim is complied with.

The final contention of the appellees is, that if the October, 1884, conveyance was fraudulent, and discovered by them in such time as to make the statute of limitations a bar, yet the conveyance by Brown of lots Nos. 6 and 7 in April, 1886, to Mrs. Cooper's husband gave appellees a new cause of action. In this view we concur. From the evidence of Mr. Brown in the record it appears that during the time *Richards held the title* to these lots he agreed with Mrs. Cooper that, if she would sell them, or find a purchaser for them, he would allow her as commissions what-

ever surplus remained after the satisfaction of her debt to the bank. The record does not expressly show that a purchaser was procured by Mrs. Cooper for the property, but sufficient of the lots were sold to pay her debt to the bank, and Mr. Brown, in fulfillment of Richards' agreement, conveyed these lots to Mrs. Cooper's husband at her request. Here, then, Mrs. Cooper became the owner of property which, if conveyed directly to her, appellees would have been able to levy upon. She had it conveyed to her husband for the very purpose of preventing this levy. This was a fraud; not a continuation of the old fraud of October, 1884; not a consummation of that fraud, but a *new and independent* one; and appellees' cause of action for relief therefrom did not accrue until the filing for record of the deed from Brown to Mr. Cooper. (See *Piper v. Hoard*, 107 N. Y., 73.) The claim of appellants, that Mr. Cooper paid anything for this property, is not supported by the evidence.

Complaint is made by appellants because the decree is silent as to said lots 8 and 9, and no account taken of taxes and interest on the Bowles mortgage paid by Mr. Cooper on lots 6 and 7. As to lots 8 and 9 we think the statute of limitations precludes appellees from questioning Cooper's title to the same. The decree of the district court will be so modified here as to dismiss the petitions and cross-petitions of appellees as to said lots 8 and 9. As to interest and taxes paid on lots 6 and 7 by Mr. Cooper, he accepted the title to these lots without consideration and for the purpose of defrauding the creditors of his wife, and is therefore in no position to ask a court of equity to relieve him from burdens he voluntarily and fraudulently assumed. A decree will be entered in this court dismissing the petitions and cross-petitions of appellees as to lots 8 and 9, block 124, in the city of Lincoln, and as thus modified the decree of the district court is in all things affirmed.

DECREE ACCORDINGLY.

 Campbell v. Brosius.

RYAN, C., concurs in the affirmance of the decree of the district court.

IRVINE, C.: I concur in the conclusion reached, but not in the construction given the statute of limitations. I think the statute means that in such cases the cause of action shall not be deemed to accrue until the discovery of the fraud, but not necessarily that it does accrue upon such discovery. The cause of action in this case was the right of the creditors to proceed against the fraudulent grantee, and was not complete until judgments were recovered. I therefore think that the statute began to run upon the recovery of judgments, when the creditors were for the first time in position to institute the action.

THOMAS L. CAMPBELL V. FRANK BROSIUS.

FILED APRIL 26, 1893. No. 5108.

Assumpsit: QUANTUM MERUIT: PLEADING: PROOF: INSTRUCTIONS. Allegations of value in a pleading are not to be taken as true by a failure to deny them; and in all cases founded upon a *quantum meruit*, where the value of the services is not expressly admitted, the question of value is in issue and must be proved, and submitted to the jury.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J.

Byron Clark, for plaintiff in error.

Beeson & Root, contra.

IRVINE, C.

This action was brought by the defendant in error against the plaintiff in error to recover upon a *quantum meruit*

36	792
45	863
36	792
54	636

Campbell v. Brosius.

for digging two wells for the plaintiff in error. The petition alleged that the reasonable value of digging the first well was \$75, and of the second \$35. The answer did not deny these allegations of value, and the only evidence in any way relating to the value of the work is found in the testimony of the defendant in error, where he states that a fair compensation for the first well would be seventy-five cents a foot, the well being 100 feet deep. The evidence shows that this well was dug with a spade, while the second was bored with a machine, and there is no testimony at all as to the value of the work on the second well. The court instructed the jury, stating the elements necessary for them to find in order to return a verdict for the plaintiff, and that, if they so found, their verdict should be for the sum of \$110, less what they might find plaintiff had received or had damaged the defendant in and about the work—there being a counter-claim for damages, and a plea of payment.

Section 134 of the Code of Civil Procedure provides that allegations of value or of amount of damage shall not be considered as true by failure to controvert them. It therefore became necessary for the plaintiff, notwithstanding the answer contained no denial of his allegations as to the value of the work performed, to prove the reasonable value thereof. And it was error for the court to instruct the jury that they should assume the amount alleged as the value of the work.

The plaintiff in error contends that the court erred in several other particulars. In view of the conclusion above stated it is not now necessary to pass upon the other assignments of error; but as the case must be remanded for a new trial, it is proper to say that upon the principal questions in dispute in the case the rulings of the trial court were substantially correct.

REVERSED AND REMANDED.

THE other commissioners concur.

HAMILTON W. HEWITT V. JOHN EISENBART.

FILED APRIL 26, 1893. No. 4922.

36	794
41	586
36	794
45	579
36	794
46	49
36	794
47	734
36	794
50	868
53	36
36	794
157	243

1. **Physicians and Surgeons: MALPRACTICE: EXPERT WITNESSES: HYPOTHETICAL QUESTIONS: REVIEW.** A judgment will not be set aside because an expert witness was permitted to answer a hypothetical question assuming a fact unsupported by the evidence, where such fact was the only hypothesis of the question, not combined with others based upon evidence, and the answer could not mislead the jury.
2. ———: ———: ———. It is not prejudicial error to permit an expert to state what steps he would take in a given case if the question does not refer to any matter in dispute but is merely introductory in its character.
3. ———: ———: **PHYSICAL CONDITION: DECLARATIONS OF A PARTY** to the suit, explanatory of his physical condition at the time the declarations are made, are admissible where the circumstances warrant the inference that they were made spontaneously and not with a view to their effect upon the controversy. Whether or not they fall within this rule must be left largely to the discretion of the trial court.
4. ———: ———: ———: **TESTIMONY** as to the physical condition of a plaintiff in a malpractice case just before the trial, and two or more years after undergoing the treatment complained of, is competent where such condition is shown to be the result of the injury in question and is of a permanent nature.
5. ———: ———: **TREATMENT: DEGREE OF SKILL.** The law requires of a surgeon in the treatment of his patient the exercise of that degree of knowledge and skill ordinarily possessed by members of the medical profession.
6. ———: ———: **EXPERT WITNESSES: TESTIMONY.** In a malpractice case it is not necessary to sustain a verdict for the plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper; nor will the fact that all such witnesses agree that a portion of such treatment is proper under some circumstances, in itself defeat a recovery.
7. ———: ———: **EXPENSE OF EFFORTS TO CURE INJURY: RECOVERY.** There can be no recovery for expense incurred in efforts to cure an injury, unless it be shown that the expense so incurred was reasonably necessary.

ERROR from the district court of Saline county. Tried below before MORRIS, J.

F. I. Foss and Robert Ryan, for plaintiff in error.

J. D. Pope and Hastings & McGintie, contra.

IRVINE, C.

This action was begun by defendant in error against plaintiff in error to recover damages on account of the alleged negligent and unskillful setting, dressing, and caring for a broken leg of defendant in error by plaintiff in error, a physician and surgeon. The answer admitted the treatment of the broken leg, but denied negligence and want of skill, and alleged that any injury sustained by defendant in error was due to his own negligence and disobedience of plaintiff in error's instructions. This the reply denied. A verdict was found and judgment rendered for defendant in error.

It appeared that defendant in error suffered an oblique fracture of both tibia and fibula at the junction of the middle and lower third of those bones. The accident occurred in the country at night, and plaintiff in error called the following morning. He reduced the fracture, having the assistance of defendant in error's son at least. There is some testimony that another person also assisted. He then placed the limb in splints made at the time from pieces of a light packing box. A posterior splint was used extending from about six or eight inches above the knee to below the heel. This was padded with cotton and wrapped with cloth. To this splint was attached at right angles a foot-board. Two lateral splints were used extending from below the knee to the ankle. Bandages were placed around all these splints, including one binding the foot to the foot-board. A space seems to have been left at the seat of fracture, whereby some local treatment was there-

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after applied without removing the splints. The splints were not removed until about the third week after the injury. On the thirty-second day the splints were finally removed and plaster of Paris dressing applied, which was renewed once or twice thereafter. After the first plaster of Paris dressing was applied Eisenbart got crutches and moved about somewhat. The final result was the shortening of the leg about one inch and a half, caused by a displacement of the fragments of the bones, the lower pieces extending up alongside the upper and all four ends uniting laterally. This tendency towards shortening seems to have been first observed when the first plaster of Paris dressing was removed. When it was renewed a weight was attached, apparently to the lower part of the new dressing, by means of a cord and pulley. Upon all other points at all material to the case there is a marked conflict of evidence. A great deal of expert testimony was taken which, as seems to be usual in such cases, is bewilderingly inharmonious.

A great many exceptions were taken to the admission and rejection of testimony. We shall notice only those specifically referred to in the briefs, simply observing that the other exceptions are of minor importance and not well founded.

Dr. Beghtol, a witness for defendant in error, was asked: "Can a limb be extended in the kind of a fracture we speak of, and properly set, without the assistance of some other than the surgeon?" This was not founded upon any evidence in the case, all the witnesses agreeing that Dr. Hewitt had *some* assistance. If this element had been interjected in a question containing any other elements founded upon the evidence, the overruling of an objection thereto would certainly be prejudicial error. We cannot see, however, how, standing alone, its answer could prejudice plaintiff in error. If an element not within the evidence be combined with others supported by evidence, an

answer to the question might be founded in part or entirely upon the hypothesis improperly assumed, and be referred by the jury to the proper hypothesis. But where the improper hypothesis stands alone, no such result can follow. The objection should have been sustained, but the error was without prejudice. Similar questions were put to the other witnesses without objection.

Dr. Beghtol was also asked in effect what would be the result of a proper reduction and improper dressing of such a fracture, and complaint is made of the admission of his answer, on the ground that it assumed facts not proven. There is testimony in the record tending to show an improper dressing, and the overruling of the objection was right.

Dr. Watson was asked, "What would be your first steps in a fracture of that character, if it was at the juncture of the lower and middle third of the tibia and fibula, or both bones of the leg?" Other similar questions were put, but called forth no answer except in accordance with the steps actually taken by Dr. Hewitt.

These questions were introductory, and when the witnesses were called upon for a professional opinion upon the case, the form of the interrogatory was changed so as to call for a description of "what would be proper" treatment. What course a particular surgeon would take would not be competent evidence upon an issue in the case, but such questions, when purely of a preliminary character and not calling forth evidence upon contested points, are not prejudicially erroneous.

A witness, called to show the extent of Eisenbart's injuries, testified that he employed Eisenbart to work for him and directed him to do some spading; that Eisenbart failed to make proper progress with this work, and on witness asking him the reason, Eisenbart explained that his inability to use the spade was due to the then condition of his leg. The admission of this declaration is assigned as error.

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There can be no doubt that the declarations of a party as to a past occurrence would be inadmissible, unless in the nature of admissions, but here the question under investigation was the physical condition of the plaintiff at the time the declarations were made. Statements made to physicians called upon for treatment have been held admissible even when they referred to past occurrences, and declarations to others are admissible when confined to present feelings or conditions. They may of course in some cases be simulated, but they must from necessity be admitted in evidence, especially where, as in this case, there are no grounds shown for believing they were made for an ulterior purpose. The trial court must be permitted to exercise its discretion, very largely, in determining whether the declarations were made under such circumstances as to permit the inference that they were genuine expressions, and the jury must be left to determine whether or not such inference shall be drawn. (Greenleaf, Ev., 102; *Carthage Turnpike Co. v. Andrews*, 102 Ind., 138; *Cleveland, C., C. & I. R. Co. v. Newell*, 104 Id., 264; *Blair v. Madison County*, 46 N. W. Rep. [Ia.], 1093; *Eckles v. Bates*, 26 Ala., 655; *Howe v. Plainfield*, 41 N. H., 135; *Towle v. Blake*, 48 Id., 92; *Kennard v. Burton*, 25 Me., 39; *Elliott v. Van Buren*, 33 Mich., 49.)

Complaint is made in a general manner of the court's allowing the general result of the injury to be shown instead of confining the proof to the excess of injury and suffering beyond that necessarily entailed by such an accident. There was evidence as to the extent of shortening ordinarily to be expected in such cases, and as to the length of time usually occupied in the healing process. In such cases the exact *quantum* of damages is not susceptible of direct and exact proof, but must be left for the jury to admeasure under appropriate instructions. By an instruction correct in its terms and not excepted to by plaintiff in error the jury was limited in admeasuring damages to the pain, suffering, and injury caused by the negligence of

plaintiff in error. It is also contended that testimony of surgeons as to the condition of Eisenbart's leg shortly before the trial was improperly admitted. This testimony relates to the length and shape of the leg, and it was shown that this condition was due to the position in which the bones had united after the fracture. The condition of the leg at the trial was thus clearly connected with the injury and the testimony was properly admitted.

It is urged that the eighth instruction was misleading as to the *onus probandi*. The giving of this instruction was not objected to in the motion for a new trial, nor is it assigned as error. Errors in the giving of instructions will not be considered unless specifically assigned. This has been repeatedly decided. (*Russel v. Rosenbaum*, 24 Neb., 769.)

The errors specifically assigned in the giving and refusing of instructions relate only to those requested by the parties. The transcript of the record fails to group the instructions in such a manner as to distinguish very clearly those given by the court of its own motion and those requested by the parties. Objection is made to the giving of those numbered 1, 2, and 3, asked by defendant in error. Numbers 2 and 3 appear from the record to have been *refused*. Number 1 is as follows: "When a surgeon undertakes a case of a fracture or broken limb the implied contract on his part is that he possesses the ordinary skill and ability in his profession, and that he will use that skill and ability with diligence in and about the cure of his patients such as surgeons ordinarily employ." While the language of this instruction is not so well chosen as might be desired, it fairly states the rule governing such cases and is not erroneous.

The refusal to give a number of instructions asked by plaintiff in error is assigned as error. The law is for the most part stated correctly in these instructions, but the points covered were all substantially embraced in the in-

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structions given by the court of its own motion. There was no error in refusing them.

It is urged that the evidence is not sufficient to sustain the verdict. It is not contended that Dr. Hewitt's treatment of the injury, as enlightened by the testimony of *some* of the experts, would not amount to negligence, but the point urged seems to be that the experts disagreeing among themselves, and all of them indorsing a *portion* of the treatment pursued as proper *under some circumstances*, it cannot be said that Dr. Hewitt failed to exercise that degree of skill *ordinarily* possessed and exercised by members of his profession. In other words, that if in such cases the testimony shows that some surgeons consider the treatment adopted as proper, there can be no recovery. The adoption of this view would be to change the rule of liability so as to hold a surgeon responsible only when his acts evidence a want of skill below that of the most unskillful surgeon whom the defendant might be able to produce. The jury must judge of the skill and qualifications of the expert witnesses as well as of the defendant in the action, and it is for the jury to say upon all the evidence what treatment amounted to negligence under the rule of skill required.

Only one other question remains for consideration. The petition alleges, in laying the damages, that by reason of the wrong complained of defendant in error had *unnecessarily* incurred great expense in endeavoring to be cured of the defect. This was undoubtedly a clerical error in drawing the petition, and did the evidence sustain any claim for damages of that character an amendment might at this time be permitted. (*Homun v. Steele*, 18 Neb., 652.) The only testimony upon this point is as follows:

Q. Were you at any expense for medicine and treatment?

A. Only a doctor's bill.

Q. How much was that?

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Objected to, as immaterial and irrelevant. Overruled and defense excepts.

A. About \$85.

There is nothing to show when or how this expense was incurred, whether it was due to injuries produced by defendant's negligence, whether the expense was necessary or the amount of the bill reasonable. No recovery could be based on such evidence, and as it was probably considered by the jury in estimating the amount of damages sustained, the case should be reversed and remanded, unless within thirty days defendant in error file a remittitur to the amount of \$85 and interest at seven per cent from the date of the judgment. Should this be done the judgment will be affirmed.

JUDGMENT ACCORDINGLY.

RAGAN, C., concurs.

RYAN, C., took no part in the decision.

**ROCKFORD WATCH COMPANY, APPELLANT, V. WILLIAM
C. MANIFOLD ET AL., APPELLEES, AND CITIZENS
BANK OF WYMORE ET AL., APPELLANTS.**

FILED APRIL 26, 1893. No. 4716.

1. **Chattel Mortgages: AGREEMENT OF MORTGAGEES AS TO PRIORITY: FRAUD.** A junior mortgagee of chattels, who agrees with the senior mortgagee and the mortgagor that the goods mortgaged may be sold and the proceeds applied to the payment of the mortgages in the order of their priority as disclosed by the records, cannot, after such sale and appropriation of the proceeds, maintain an action to avoid the senior mortgage for fraud in its inception without proof that the facts constituting the fraud were discovered after the agreement and sale.

2. ———: **ACTION TO AVOID FOR FRAUD: PLEADING.** In an action to avoid a conveyance or mortgage for fraud the facts constitut-

36	801
40	769
36	801
47	640
48	354
48	528
36	801
52	298
36	801
58	514
36	801
59	758
36	801
62	782

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ing the fraud must be specifically pleaded; a general allegation of fraud is insufficient.

3. ———: FORECLOSURE: AN AGENT FOR THE PURPOSE OF SELLING GOODS will not be permitted to sell to himself, even though the sale be public, and no actual fraud appear. In case he do so, he will be required to account to his principals for any profit he may have realized.
4. ———: ———: PLEADINGS: DECREE: REVIEW. The findings and judgment in a case must be based upon the pleadings. A decree in an action between a mortgagor and certain mortgagees of chattels, whereby a mortgage not attacked by the pleadings, and the holder whereof is not a party to the action, is declared void, is erroneous.
5. ———: ———: UNLAWFUL SALE: RIGHTS OF UNSECURED CREDITORS: CONVERSION. Unsecured creditors of a mortgagor of chattels are entitled to have the mortgages foreclosed as required by law, and a sale otherwise than as the law provides, although in accordance with an agreement of the mortgagor and mortgagees, is no protection to those participating in the proceeds of the sale. They are liable to account to such creditors for the value of the goods, less the valid liens thereon.
6. ———: LIEN UPON STOCK OF MERCHANDISE: GOODS SUBSEQUENTLY PURCHASED. A mortgage upon a stock of merchandise, under that general description, attaches only to such merchandise as was in the stock when the mortgage was executed, and not to any afterwards purchased.

APPEAL from the district court of Gage county. Heard below before APPELGET, J.

C. S. Otis and *E. O. Kretzinger*, for appellant Rockford Watch Company.

A. D. McCandless, for appellant Citizens Bank of Wyomere.

Griggs, Rinaker & Bibb, for appellant Baldwin & Co.

T. F. Burke, for appellants J. A. Norton & Son.

Hazlett & Le Hane, for appellee O. P. Newbranch.

Winter & Kauffman, for appellees Max Meyer & Bro.

IRVINE, C.

William Manifold and Charles B. Heistand were engaged in the jewelry business in Wymore, and on the 17th day of June, 1889, executed a chattel mortgage upon their stock of merchandise, tools, and fixtures in favor of the Citizens Bank of Wymore, to secure a note of \$600. This mortgage was in the ordinary form, and was filed for record on the 18th day of June, 1889. The mortgagors were, however, permitted to remain in possession and to deal with the stock of goods mortgaged in the ordinary course of business until February, 1890. On the 23d day of February, according to the parol evidence, chattel mortgages were executed bearing date the 24th day of February, and recorded on that date in favor of the following persons, and in the order stated, for divers amounts: N. G. Levinson & Co., William Heistand, Max Meyer & Bro., Baldwin & Co., and J. A. Norton & Son. At about this time the defendant Newbranch took possession of the stock of goods, tools, and fixtures on behalf of the Citizens Bank and proceeded to advertise the same for sale. On the 29th day of March a public sale was had of the goods. Prior thereto, however, an agreement in writing was entered into on behalf of Levinson & Co., Baldwin & Co., Max Meyer & Bro., and the Citizens Bank, by their respective attorneys, and also by Manifold & Heistand, and by William Heistand, through C. B. Heistand, whereby it was agreed among them that the entire stock of goods and fixtures conveyed to the different mortgagees should be sold under the advertisement of the Citizens Bank, and the proceeds paid to said mortgagees in the order of their priority, as shown by the records of the county clerk's office; and that said goods should be sold in bulk. There was also a separate agreement signed for Norton & Son by their attorney, similar to the above, except that it contained no provision for a

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sale in bulk. These agreements were handed to Newbranch, who, at the time and place advertised, offered the property for sale. After several bids had been received, Newbranch stepped from the chair upon which he stood to cry the goods, and negotiated a purchase for himself of the Levinson mortgage from the agent of Levinson & Co., who was present. This mortgage was to secure a debt of \$345, and was purchased by Newbranch for \$275. The sale was then resumed, the bidders thereafter being Newbranch and one Bromwell. Newbranch became the purchaser. He drew his check for the purchase price, and gave it to the cashier of the First National Bank of Wymore, who also seems to have been acting for the Citizens Bank in the matter, and the cashier, after deducting the expense of foreclosure, and the amount of the Citizens Bank debt, paid to the agent of Levinson & Co. the amount of its mortgage, and the agent then deducted the \$275 which Newbranch had agreed to pay for the mortgage, and paid the balance remaining to Newbranch. There then remained of the purchase money \$150, which was paid to C. B. Heistand, ostensibly towards the satisfaction of the William Heistand mortgage. Newbranch, a few days after the sale, disposed of the property to Bromwell at a profit of some \$275. Some days afterwards the plaintiff obtained judgment against Manifold & Heistand upon an account for goods sold, and execution having been returned unsatisfied, commenced this action to declare the mortgages void and compel an accounting. William Manifold and Charles B. Heistand, the partners who composed the firm doing business as the Citizens Bank, the First National Bank of Wymore, Newbranch, Baldwin & Co., Norton & Son, and Max Meyer & Bro. were made defendants. Cross-petitions were filed by Baldwin & Co. and Norton & Son. Upon trial a decree was entered, establishing the liens of the Citizens Bank, of Levinson & Co., of Baldwin & Co., and of Norton & Son, in the order

named; also finding that the William Heistand mortgage was fraudulent and void, and the Max Meyer & Bro. mortgage paid. There was also a finding generally in favor of Newbranch, Bromwell, and the First National Bank. The decree ordered the payment by the Citizens Bank of the \$150 paid upon the Heistand mortgage to apply upon the Baldwin claim. The Citizens Bank, Norton & Son, Baldwin & Co., and the plaintiff all appealed.

The appeals of Baldwin & Co. and Norton & Son will be first considered. Their cross-petitions are substantially alike, and are based upon the allegations that they signed the agreements in regard to the sale of the goods, believing the mortgage of the Citizens Bank a *bona fide* mortgage, but they have since ascertained it to be fraudulent. The cross-petitions contain no allegations of fraud except that they charge, upon information and belief, that the bank's mortgage "was fraudulent and void." This is not a sufficient pleading of fraud. It is too well settled to require any reference to authorities that a general allegation of fraud is insufficient. The facts constituting the fraud must be specifically pleaded. Furthermore, the evidence shows that no facts were discovered after signing the agreement, and whatever is now known to these cross-petitioners was known at that time. Their agreement expressly recognized the validity of the bank's mortgage and provided for its payment, and estops them from now attacking it.

The cross-petitions of these appellants also attack the sale, alleging that Newbranch acted as the agent of all the mortgagees, and while sustaining that relationship bid the property in himself and resold at a profit. Newbranch denies that he acted as agent for any others than the Citizens Bank, but this denial is, for the most part, merely his own conclusion as to the legal effect of his acts. There is some contradictory evidence as to certain conversations alleged to have taken place between him and the attorneys for these appellants, but we do not think these conversations very

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material. It clearly appears that Newbranch was in possession of the stock of goods on behalf of the Citizens Bank when the agreements above referred to were made; that these agreements came to his notice, and that he proceeded to sell the property, and disposed of the proceeds, with knowledge and with the purpose of complying with these terms of the agreements. If he was not acting under these agreements, he had no authority from any one to dispose of more of the stock than would be sufficient to satisfy the bank's mortgage. Whatever his own understanding may have been, the undisputed evidence as to his acts places him in a fiduciary relationship to all the mortgagees, including the appellants. He not only cried the sale, but he assumed its conduct absolutely, including the care of the property beforehand, the direction of the sale and looking after the proceeds thereof. He did bid the property in for himself, and he did resell after a very few days at a considerable profit. The evidence does not disclose any fraud or even unfairness in his conduct, but such transactions upon the part of an agent are voidable at the option of the principal without regard to the existence of actual fraud. They are voidable not because there *was* fraud, but because there *might be*, and because the law, upon grounds of public policy, will not permit an agent to assume a position where conflicting interests will expose him to the danger of sacrificing his principal to himself. The doctrine extends to all cases of agency with almost the same force as to cases of trusts, and has been applied in every adjudicated case, so far as we are aware, to agents for the purpose of selling goods or land. It has been held to apply to public sales as well as private, and even to an agent empowered to sell at a stipulated price. The principle is well stated in Pomeroy's Equity Jurisprudence, 2d ed., sec. 959, where a vast number of authorities are collated. Among the numerous cases, some of those presenting features similar to those of the

case at bar are as follows: *Davoue v. Fanning*, 2 Johns. Ch. [N. Y.], 252; *Brock v. Rice*, 27 Gratt. [Va.], 812; *Ruckman v. Bergholz*, 37 N. J. L., 437; *Bain v. Brown*, 56 N. Y., 285; *White v. Ward*, 26 Ark., 445; *Newcomb v. Brooks*, 16 W. Va., 32; *Martin v. Wyncoop*, 12 Ind., 266; *Mason v. Martin*, 4 Md., 124; *Brothers v. Brothers*, 7 Ired. Eq. [N. Car.], 150; *Palton v. Thompson*, 2 Jones Eq. [N. Car.], 285. In all such cases the agent will not be permitted to realize for himself a profit, and must account to his principals for all profits realized. The district court erred in not so holding.

The Citizens Bank bases its appeal upon that part of the decree which directs it to pay over the \$150 paid upon the Heistand mortgage. In none of the pleadings is the Heistand mortgage attacked, and while the evidence was certainly sufficient to justify the finding of the court that this mortgage was void, such a finding cannot be sustained, as it is irrelevant to any issues in the case. The validity of the Heistand mortgage was not in issue, and William Heistand was not a party to the suit. The finding and judgment of the court in that respect were erroneous.

The plaintiff stands in an attitude different from that of the mortgagees and attacks both the mortgages and the sale. It is unnecessary to refer to the grounds upon which the validity of the bank's mortgage is attacked. We have held that the parties to the agreements in regard to the sale are bound by those agreements. The plaintiff was not a party to them, and had a right to insist that the mortgages should be foreclosed as the law requires. Unless the sale was made in accordance with law it amounted to a conversion of the goods. So far as the bank is concerned, the sale was properly advertised and publicly held, but it had no right to proceed beyond the satisfaction of its own mortgage. Moreover, the bank's mortgage was upon the stock of goods as it existed at the time the mortgage was given. It did not, and could not, attach to after-acquired property, and

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did not, upon its face, purport so to do. The plaintiff offered to prove that the bank seized and sold goods purchased by the mortgagors from the plaintiff after the mortgage was given. This evidence was excluded, and in this we think the court erred. It is probable that the court's action was based upon the theory that the other mortgages did cover the property acquired by the firm in the period intervening after the execution of the mortgage to the bank. But there was no valid foreclosure of these later mortgages; and as to all property not covered by the bank's mortgage, and as to all property covered by that mortgage beyond such as would be sufficient to discharge the debt secured thereby, the plaintiff has the right to insist upon foreclosure by junior mortgagees in accordance with law and to hold the recipients of the proceeds of an unlawful sale responsible for the value of the goods.

In view of the conclusion reached, no decree can be rendered in this court which we can be assured will do justice to the parties. The case is therefore reversed and remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

THE other commissioners concur.

36	808
37	846
38	868
44	421
36	808
53	104
36	808
60	389
36	808
62	493

THOMAS BAILEY V. STATE OF NEBRASKA.

FILED APRIL 26, 1893. No. 4518.

- 1. Information: DEFECT IN VERIFICATION: WAIVER.** A defect in the verification of an information is waived by pleading to the information.
- 2. Marriage: VALIDITY: PROOF.** Marriage is a civil contract requiring in all cases for its validity only the consent of parties

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capable of contracting. The fact of marriage may be proved by the testimony of one of the parties.

3. **Adultery: EVIDENCE.** Where a defendant is charged with adulterous cohabitation while living with his wife, proof of such adulterous cohabitation during any portion of the period laid in the information is sufficient to sustain the charge.
4. ———: ———. A single act of adultery at a time outside of the period of adulterous cohabitation thus proved is a separate offense, for which the defendant may be punished, although committed within the period of adulterous cohabitation laid in the information.
5. ———: **MARRIAGE WITHOUT SOLEMNIZING OFFICER: PROOF: NEWLY DISCOVERED EVIDENCE: NEW TRIAL.** In a prosecution for adultery the only evidence of defendant's marriage was that of the complaining witness, the woman alleged to be defendant's wife. The marriage relied upon was by words of consent without the presence of a solemnizing officer or of witnesses. A new trial was asked on the ground of newly discovered evidence, the affidavits removing every question of negligence in procuring the evidence. The newly discovered evidence alleged consisted of the declaration of the complaining witness contradicting her testimony as to the marriage. *Held*, That under these circumstances the motion should have been sustained.
6. **Motion for New Trial: NEWLY DISCOVERED EVIDENCE.** A motion for a new trial should be granted on the ground of newly discovered evidence tending to impeach a witness by showing declarations contradicting his testimony, where such evidence is of so controlling a character that it would probably change the verdict.

ERROR to the district court for Seward county. Tried below before NORVAL, J.

Norval Bros. & Lowley, for plaintiff in error.

George H. Hastings, Attorney General, for the state.

IRVINE, C.

The plaintiff in error was informed against in three counts, the first charging him with deserting his wife, Matilda Bailey, on the 1st day of January, 1887, and from

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that day until March 1, 1888, living and cohabiting with one Della Brong in a state of adultery. The second count charges him with committing adultery with Della Brong on February 18, 1888; the third, with keeping Della Brong and wantonly cohabiting with her in a state of adultery from November 7, 1886, to March 1, 1888, while being with his lawful wife, Matilda Bailey. He was acquitted upon the first count and found guilty upon the second and third. The sentence was that plaintiff in error should pay a fine of \$200 and be committed to the county jail for the period of three months upon the second count, and also that he pay a fine of \$200 and be committed for a like period upon the third count.

1. The first question presented relates to the sufficiency of the information, which was verified by the oath of Matilda Bailey before a notary public in Lancaster county. It is urged that a valid oath is essential to an information, and that the district court acquired no jurisdiction under an information not verified before a magistrate. There can be no doubt that a verification before a notary public is insufficient (*Richards v. State*, 22 Neb., 145), but this was a defect open merely to a motion to quash and was waived by pleading to the information. It was not jurisdictional. (*Davis v. State*, 31 Neb., 252.)

2. The next point urged is that there was not sufficient evidence to establish a marriage between plaintiff in error and Matilda Bailey, who is alleged in each count to be his lawful wife. It appears that plaintiff in error and Matilda Bailey, then known as Mrs. Tyson, met at Lyons, Iowa, in 1866, plaintiff in error going to the house of Mrs. Tyson to board. They lived together in Lyons until about 1869, when they came to Nebraska together and soon after took up a homestead. They seem to have lived together until 1887, when Matilda left him. One child, still living, was born to them. Matilda testifies in one place that plaintiff in error came to board and "promised that he would be

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my husband and I should be his wife as long as we lived. He promised to be true to me." Again: "He said he would be true to me; that if he married me he couldn't be truer to no one than he would be to me, and that it was just as good as to go and get married." Again:

Q. Will you state to this jury how you were married?

A. Yes, sir.

Q. How?

A. Why, he promised that he would be my husband and I promised to be his wife.

Q. Is that all of it?

A. Yes, sir, and we talked together.

Q. You talked together?

A. Yes, sir.

Q. And you thought you were married?

A. Yes, sir.

Further: "He said it was a mere matter of form getting married, and if I would live with him he would live with me, and I told him I would, I' guess." "Yes, sir, I told him I would." This conversation, she says, occurred upon a Sunday afternoon, about the middle of August, 1866. She also says that their relations were kept secret in Iowa because of the opposition of her older children. They certainly lived from that time until the separation in 1887 as man and wife, and she has been known to neighbors and friends as Mrs. Bailey ever since coming to Nebraska. There is also some evidence of Bailey's introducing her to strangers as his wife. It cannot be denied that there are many things in her own testimony and elsewhere in the record tending to discredit her story, but it is the province of the jury to pass upon the credibility of witnesses, and if her testimony above quoted establishes a marriage the verdict cannot be disturbed on the ground of insufficient evidence. (*Dutcher v. State*, 16 Neb., 30.)

Marriage is, in Nebraska, a civil contract to which the

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consent of parties capable of contracting is essential. (Comp. Stats., ch. 52, sec. 1; *Gibson v. Gibson*, 24 Neb., 394.) When contracted in another state a marriage must here be held valid if valid by the laws of the state where contracted. (Comp. Stats., ch. 52, sec. 17.) There was no proof of the law of Iowa, and in the absence of proof it will be presumed to be in accord with our own. (*Lord v. State*, 17 Neb., 526.) Wherever treated as a civil contract it is sufficient to constitute a marriage that the minds of the parties meet in a common consent at the same time. No particular form of expression is required.

It is claimed that in cases like that at bar there must be direct evidence of the marriage. This may be true, but Mrs. Bailey's testimony is direct evidence of the fact. The rule, when examined in the light of the authorities, only forbids in such cases the establishing of a marriage by proof of cohabitation, reputation, and "holding out." The reason is that while ordinarily such evidence is sufficient because the law places that interpretation upon ambiguous acts which favors innocence, and will not assume that a cohabitation is illicit if by presuming marriage it would be lawful, yet in a prosecution for adultery this presumption conflicts with the presumed innocence of the prisoner of the crime of which he is charged, and therefore such evidence in such cases cannot alone establish a marriage. The essentials of a valid marriage are in all cases the same, the distinction being in the mode of proof alone. Mrs. Bailey's testimony is direct and competent evidence in this case, and if believed, establishes a contract as binding for all purposes as if made in the presence of chosen witnesses at the altar.

3. Plaintiff in error contends that there was no evidence of his cohabiting with Della Brong until after Matilda Bailey ceased to live with him, and that therefore no conviction could be had on the third count. Matilda Bailey testified that she left him in February, 1887; that "he went with Della Brong and staid there the winter before I

left him ; from November until I left him in February he frequently staid at their house three days in the week." This, together with the other evidence as to the relations between plaintiff in error and Della Brong, was sufficient to justify the jury in finding an adulterous cohabitation before Matilda left and within the period laid in the information. Time is not of the essence of the offense and proof of adulterous cohabitation during any portion of the period charged is sufficient. (*State v. Way*, 5 Neb., 283.)

4. It is further contended that the second count, alleging a single act of adultery, was founded upon a portion of the offense charged in the third count, and that therefore a conviction and sentence upon each count would amount to a double punishment for the same offense. We need not inquire whether or not this point would be well taken, provided the single act of adultery were within the period of adulterous cohabitation proved. It is not contended that two such counts may not be joined in one information and a conviction had upon either according to the evidence. As already said, the evidence shows, and without contradiction, that plaintiff in error and Matilda Bailey have not lived together since February, 1887. The offense charged in the third count—keeping another woman and cohabiting with her in a state of adultery while living with one's wife—must therefore have been complete at that time, and an act of adultery later would constitute a distinct and separate offense under another clause of section 208 of the Criminal Code.

5. A motion for a new trial was overruled and sentence passed December 5, 1889, and on January 18, 1890, a supplemental motion for a new trial was filed, supported by affidavits of newly discovered evidence. The affidavit of R. H. Woodward is to the effect that he met Matilda Bailey at the state fair grounds in Lincoln in 1887 and in a conversation, narrated at length in the affidavits, she declared that she had come to Nebraska with Bailey and had

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here lived with him; that after some time they had discussed the matter of marriage and decided that having lived so long together without being married they might still continue in the same course. The affidavits of defendant and of each of his counsel show that this evidence was not known to any of them until after the sentence was imposed, when it was disclosed by Woodward in the course of a casual conversation with one of the attorneys upon a railway train. This supplemental motion was overruled, and in this we think the court erred. There was no laches in failing to produce the testimony upon the trial. While the general rule is established that a new trial will not be granted because of newly discovered evidence impeaching a witness, this rule has its limitations. This court has stated the doctrine as to cumulative evidence to be that a new trial will not be granted unless such evidence be of so controlling a character as to probably change the verdict. (*Flannagan v. Heath*, 31 Neb., 776; *Keiser v. Decker*, 29 Id., 92.) The same principle should apply here. The only direct evidence of the fact of marriage was the testimony of the prosecuting witness. While the jury was justified in believing it, there are many facts tending to its discredit. The evidence of Woodward as to a contrary statement made to him before this prosecution was begun would be a very material fact for the consideration of the jury in weighing her testimony and would very probably have led to a different result. Moreover, this testimony would not be entirely in the nature of impeachment. The question of marriage depended largely upon the intention of the parties, and this testimony tends to show that Mrs. Bailey had not in fact regarded their relations as those of husband and wife. Under the circumstances of this case a new trial should have been allowed.

REVERSED AND REMANDED.

THE other commissioners concur.

HELEN F. REED, APPELLANT, V. JOHN N. SNELL ET
AL., APPELLEES.

FILED MAY 1, 1893. No. 4231.

Partition: PARTNERSHIP: PARTIES: EVIDENCE. In an action for partition the defendant alleged a partnership between himself and one R., who had conveyed to the plaintiff. The court below found such partnership to exist and that the plaintiff had no rights in the premises, and that one R., husband of the plaintiff, was a necessary party for an accounting. *Held*, That the testimony failed to show a partnership in the land but merely in the stock and improvements, and that the plaintiff could maintain the action, subject to the payment of the improvements made by the firm.

APPEAL from the district court of Howard county.
Heard below before TIFFANY, J.

T. R. Wallace and *Thomas Darnall*, for appellant.

A. A. Kendall and *Paul & Templin*, contra.

MAXWELL, CH. J.

This action was brought by the plaintiff against Snell and wife for a partition of certain real estate in Howard county. The defendants answered separately, that of John N. Snell being as follows:

"Comes now John N. Snell, and for himself answering plaintiff's petition in this behalf says:

"1. He denies each and every allegation in said petition contained except such as may herein be explained or expressly admitted or denied.

"2. Defendants admit that Isabel Snell is the wife of this defendant and that J. E. Reed is the husband of the plaintiff.

"3. Denies that plaintiff is the joint owner with this defendant in the real estate described in plaintiff's petition,

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or that she has any interest therein whatever against this defendant as owner or purchaser thereof.

"4. And further answering, this defendant avers that on or about the 30th day of August, 1883, the said J. E. Reed, husband of plaintiff, being then and there the owner of certain real estate described in plaintiff's petition, as well as the growing crops thereon, and of certain cattle, horses, and other live stock on said premises, and other personal property thereon used in and upon said lands, represented to this defendant John N. Snell, that the business of stock growing and raising in Nebraska was very profitable; that this business was prosperous and productive; and said J. E. Reed then and there solicited defendant John N. Snell to enter into a copartnership with the said J. E. Reed for the purpose of buying, raising, breeding, feeding, and selling of cattle, horses, and hogs, and the raising of hay and grain, and said J. E. Reed represented that his profits were large in said business.

"5. That by reason of said representations of said J. E. Reed to this defendant, this defendant was induced to and did enter into a copartnership with said J. E. Reed, by the terms of which it was mutually agreed to and with each other, by verbal contract of partnership, that the said firm should be composed of J. E. Reed and said John N. Snell, under the firm name of Reed & Snell, and that said partners should share alike in all expenses of said business, and also should share and share alike in the profits and losses of said business aforesaid.

"6. And defendant avers that he was unacquainted with the said business, and relying solely upon the representations aforesaid of said J. E. Reed, this defendant entered into the agreement of copartnership aforesaid.

"7. That in pursuance of their agreement made and entered into, and for the purpose of carrying the same into effect, said J. E. Reed sold and conveyed to this defendant a one-half interest in the real estate described in plaintiff's

petition, in consideration whereof this defendant then and there paid said J. E. Reed the sum of \$5,300; and also, in consideration of the sum of \$3,212, said J. E. Reed sold and delivered to this defendant a one-half interest in all crops then growing on said real estate in plaintiff's petition described, and a like interest in 166 head of cows, heifers, steers, and bulls, and it was mutually agreed and understood by and between said J. E. Reed and this defendant that all of said property, real and personal, and the increase thereof, should be and constitute the assets and capital of said firm, with the further agreement that said capital might be added to at any time as said J. E. Reed and this defendant might agree.

"8. That afterwards, to-wit, on or about the — day of —, 1883, there were added to the stock of said firm one boar pig and ten brood sows of the aggregate value of \$100, of which sum this defendant paid \$65, an excess of \$15 over and above the legitimate and proper share of this defendant in pursuance of said partnership agreement, which said sum of \$15 has not been returned or paid to this defendant by said firm of Reed & Snell.

"9. That before said partnership was formed said J. E. Reed purchased a part of said real estate from one C. H. Houghton, and thereafter added to his property the purchase of certain cattle until there were 166 head as aforesaid, and subsequently, and after forming said partnership by said J. E. Reed and defendant J. N. Snell, an agreement was entered into by and between said firm of Reed & Snell and one P. R. Granger, by which said Granger was to have charge of said property and to keep the same at his own expense under a written contract by and between said Granger and one C. H. Houghton and by said Houghton duly assigned to the said firm of Reed & Snell, a copy whereof is hereto attached as part hereof, marked Exhibit A.

"10. And it was mutually agreed and understood by and

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between the said P. R. Granger and the said Reed & Snell that no part of said personal property should be sold except certain fat cattle then being fed by said Granger under said agreement with Houghton last aforesaid.

"11. That said plaintiff Helen F. Reed had actual notice of all and singular the facts and circumstances set out and detailed in paragraphs 4, 5, 6, 7, 8, 9, and 10 hereof, and of the partnership rights and interests of this defendant in and to the real estate in her said petition set out and described, as well as of the engagements of said J. E. Reed, as the payments of the several sums of money by defendant for a half interest in said property, real and personal, as of the terms of said copartnership and the agreements referred to with said Houghton and Granger.

"12. That contrary to the terms of said several agreements, as well as the agreements of copartnership between J. E. Reed and this defendant as that with said Granger, said J. E. Reed entered upon said land and did unlawfully and fraudulently sell all cattle, horses, hogs, and other personal property hereinbefore referred to and described as the property of said firm of Reed & Snell, and the increase of said property aforesaid, and received therefor large sums of money, the exact amount whereof is unknown to this defendant, and that said Reed wrongfully and fraudulently, and with intent to cheat, wrong, and defraud this defendant, refused to account to said firm of Reed & Snell for the proceeds of said personal property so as aforesaid sold; that said personal property constituted a large part of the assets of said firm of Reed & Snell, of all which said plaintiff Helen F. Reed had actual knowledge.

"Wherefore this defendant prays that the said J. E. Reed and Helen F. Reed be made a party defendant to this cross-petition and be required to answer the same; that an account may be taken of the partnership affairs between J. E. Reed and this defendant John N. Snell, under the direction and decree of this court; that the said J. E. Reed be

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decreed to pay to this defendant John N. Snell such sums as he may be entitled to receive of said partnership assets; that the action of Helen F. Reed v. John N. Snell and Isabel Snell be consolidated with this bill, and that it may be declared that said deed from J. E. Reed for a pretended interest in the lands described in plaintiff's petition be declared null and void and held for naught; that said partnership be dissolved between J. E. Reed and John N. Snell, and that said real estate of said firm be sold, and upon an accounting that the proceeds of the assets of said firm be equally divided, and that said J. E. Reed be required to account for all property and money of said firm which he has had and received; that should it appear that said J. E. Reed has received all of his share of the property of said firm, then that said real estate of said firm, being the same described in plaintiff's petition, is the property of this defendant John N. Snell, and that the title thereof be quieted in him; and for the purpose of clearing the cloud from the title to said lands that said Helen F. Reed be required to reconvey said real estate, its tenements and hereditaments, to J. E. Reed, as a member of said firm of Reed & Snell, and in case she shall fail or refuse to so convey for a period of twenty days after such order, then that a commissioner be appointed by this court to make such conveyance for her, and for such other, full, and complete relief in the premises as equity and good conscience may require."

The answer of Isabel Snell need not be noticed.

The reply of the plaintiff is a general denial.

On the trial of the cause the court found the issues in favor of the defendant; that a partnership had existed between Snell and J. E. Reed, and that he was a necessary party to the action, and that the plaintiff, having purchased the land from her husband with the notice of these contracts, acquires no title or interest in the property, and the action was dismissed as to her. From the judgment an appeal was taken.

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It appears from the testimony that in 1883 one Houghton leased of P. R. Granger 314 acres of land in Howard county for five years; that he was to furnish to Granger 100 head of cows, heifers, steers, and bulls, etc., and Granger was to care for the same for five years at his own expense, at the end of which time Houghton was to receive the same number and kind of cattle he had delivered to Granger and one-half the increase, and Granger to have the residue. Soon after this contract was made J. E. Reed, husband of the appellant, purchased of Houghton the land leased to Granger and Houghton's interest in the cattle contract. Several months afterwards Reed sold the undivided one-half of the land in controversy and one-half interest in the cattle and the Granger lease to Snell. Soon afterwards Reed sold and conveyed to Snell an undivided one-half of an additional 160 acres of land now in controversy. In February, 1885, Snell and wife gave a mortgage on the undivided one-half interest of the land purchased of Reed. Three months later Reed conveyed an undivided one-half interest in the land, of which Snell had purchased the one-half interest, to the plaintiff and she claims title.

The testimony tends to show that the conveyance from Reed to his wife was made in good faith, as the land originally had been paid for with her money. The testimony also tends to show that Reed & Snell were in partnership, at least in the buying and selling of stock and of the improvements made on the land. There is no partnership shown in the land itself. As to the land, they seem to be joint owners. There are some charges of fraudulent misrepresentations on the part of Reed to induce Snell to enter into the contract, but so far as we can see the representations were made in good faith but colored with the enthusiasm which is sometimes indulged in by those who have no experience in the business in which they are about to engage and reason from mere theory colored by bright

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anticipations. Both parties seem to have been ignorant of the business. No losses or reverses were expected by either party, hence no precautions taken to guard against the same. Snell was upon the ground, saw the land and the stock, and evidently was not deceived by the representations of Reed. It is evident that there must be an accounting between Reed and Snell and that Reed is a proper party to be made a defendant. It is also apparent that the plaintiff is entitled to a subdivision of the land, but that any partnership improvements made thereon should be deducted and paid for by her. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HARRY T. JONES ET AL. V. THEODORE O. BIVIN.

FILED MAY 1, 1893. No. 4968.

Order Discharging Attachment: EVIDENCE: REVIEW. Where an order discharging an attachment is against the clear weight of evidence, it will be reversed and the attachment sustained.

ERROR from the district court of Seward county. Tried below before BATES, J.

E. C. Biggs and D. C. McKillip, for plaintiffs in error.

R. P. Anderson and George H. Terwilliger, contra.

MAXWELL, CH. J.

The plaintiffs began an action by attachment against the defendant and levied upon lots 9 and 10, in block 67, in

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Harris, Moffitt & Roberts' addition to Seward. There were three grounds of attachment, namely, that the defendant is about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors. 2. The defendant has property and rights in action which he conceals. 3. The defendant has disposed of part of his property with the intent to defraud his creditors. The defendant denies the facts stated in the affidavit for attachment. Whereupon a large number of affidavits in support of and opposed to the attachment were filed. It is conceded that the defendant conveyed the lots in question to his brother, John Bascolm Bivin, on or about the 30th day of June, 1891, and the question presented is, was the latter a *bona fide* purchaser? A number of witnesses filed affidavits stating that the defendant had said to them that there was no consideration for the conveyance to his brother, but that he had placed the property in his hands so that creditors could not reach it. This he denies and claims that the sale to his brother was a *bona fide* transaction. There is also an affidavit of the brother wherein he says:

"That on the 12th day of July, 1888, said Theodore O. Bivin became indebted to this affiant in the sum of \$1,000 for money loaned by this affiant to said Theodore O. Bivin at his request, for which said Theodore O. Bivin made, executed, and delivered to this affiant his promissory note of that date for the sum of \$1,000, a copy of which, with all the indorsements thereon, is hereto attached, marked Exhibit A, and made a part of this affidavit; that on the 30th day of June, 1891, this affiant purchased of said Theodore O. Bivin certain real property described as follows, to-wit: lots 9 and 10, block 67, Harris, Moffitt & Roberts' addition to the original town, now the city of Seward, Nebraska; that this affiant paid said Theodore O. Bivin, as consideration of and as payment for said premises, the sum of \$800, by giving said Theodore O. Bivin, at his request, credit on said note for said \$800 and by indorsing thereon

as paid the sum of \$800 as shown by the indorsement on the back of said Exhibit A, hereto attached, said indorsement being marked Exhibit B, and made a part of this affidavit; that the said indorsement on the back of said note was made in consideration of and in payment to said Theodore O. Bivin for the above described premises and for no other purpose whatever."

It will be seen that there is no statement of the amount of money he loaned his brother, or that he desired a conveyance, and the suggestion in the affidavit that the credit was given at the request of the defendant is very suggestive.

The case is very similar in some of its features to that of *Omaha Hardware Co. v. Duncan*, 31 Neb., 217. In that case the mortgagors, after denying the fraud, stated: "That on the 2d day of October, 1889, they made and executed and delivered a certain chattel mortgage to W. H. Butler and Edmund Jeffries on the stock of goods contained in the store building situate on lot 15, block 3, in Pauline, Adams county, Nebraska, being the same stock of goods taken under an order of attachment issued in this cause; that said mortgage was given to secure a valid indebtedness from these defendants to said W. H. Butler and Edmund Jeffries of \$2,217.82, and that it is provided in said chattel mortgage that these affiants were to remain in possession of said goods and sell the same at public or private sale, and apply the proceeds of such sales in liquidation of the said sum of \$2,217.82 so secured; that said mortgage was filed in the office of the county clerk of Adams county, Nebraska, on the 2d day of October, 1889, and these defendants have, in all respects, fulfilled the conditions of said chattel mortgage.' * * *

"This," it is said, "is substantially all the testimony upon the hearing for dissolution of the attachment, and it was insufficient for that purpose. The chattel mortgage, if valid, withdrew the property of the defendants from levy

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and sale upon either an attachment or execution. The circumstances under which this mortgage was made were such as to require proof from the mortgagees as to the actual consideration paid by them to the defendants. In other words, how was the debt incurred, and for what? These questions are not answered by the allegation of the defendants that the debts were *bona fide*. They should have stated the facts in regard to the creation of the debt and the consequent giving of security for the same, and the court would have drawn conclusions of law from such facts. On the face of the papers, therefore, unless this mortgage was a *bona fide* transaction, there was an attempt on the part of the defendants to place their property beyond the reach of their creditors, which would fully justify an attachment."

In our view there is a failure to establish the *bona fides* of the conveyance to the brother. The judgment is clearly against the weight of evidence. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

CHARLES G. CREWS ET AL. V. S. E. COFFMAN ET AL.

FILED MAY 1, 1893. No. 5719.

1. **County Seat: RELOCATION: COUNTY BOARD: ELECTION: PETITION.** To entitle a county board to call an election for the removal of a county seat a petition must be presented to it by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election.
2. ———: ———: **PETITION: PETITIONERS.** The petition must show the section, township, and range on which, or the town or city

in which a petitioner resides, together with his age and time of residence in the county.

3. ———: ———: SUFFICIENCY OF PETITION: OBJECTIONS: HEARING. Where objections are made by any resident elector on oath charging that a certain number of the petitioners are minors, certain other number are not electors, certain names are fictitious, a certain number have been bribed, the aggregate of which will reduce the number of petitioners below three-fifths of the votes cast at the preceding general election, it is the duty of the board to set a reasonable time for a hearing of said objections to enable parties to offer proof in support of their charges.
4. ———: ———: ———: ———: ———. Parties interested in the matter are entitled to examine the original petition in the office of the county clerk before the election is called and should have a reasonable time for that purpose. It is not sufficient to furnish a certified copy as such parties have the right to see the purported signatures of the petitioners.

ERROR from the district court of Hitchcock county.
Tried below before WELTY, J.

J. W. Cole and Reese & Gilkeson, for plaintiffs in error.

R. O. Adams, F. M. Flansburg, and W. S. Morlan, contra.

MAXWELL, CH. J.

This is a proceeding in error from the district court of Hitchcock county to reverse the judgment of that court affirming the action of the board of county commissioners calling an election for a relocation of the county seat. It appears from the record that on the 23d of June, 1892, at 9 o'clock A. M., a petition for the relocation of the county seat was presented to the board of county commissioners of that county; that G. V. Hunter, an elector and resident of that county, protested against calling an election until an opportunity could be given to examine the petition. The protest was overruled. Various motions were made on behalf of the plaintiff for an opportunity to examine the petition away from the crowd that seems to have

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filled the room where the board was sitting. These were overruled. Whereupon J. W. Cole, one of the attorneys for the plaintiff, filed an affidavit as follows:

"In the matter of the petition to call an election to vote to remove the county seat.

"John W. Cole, being first duly sworn, on his oath says: That he is one of the attorneys for the defendants in this case; that he has urgently and persistently sought, by every reasonable means made known to him, to procure a full, free, and complete examination of the plaintiffs' petition herein; that, in addition to asking this court and the plaintiffs' attorneys for this privilege of examining said petition privately, as shown by the records of this court, affiant and his associate counsel and defendants, all of whom are resident electors and qualified voters of Culbertson, Hitchcock county, Nebraska, asked this court for the privilege of taking the said petition to some quiet part of the court room for inspection and examination, all of which was refused by this board at the request of the petitioners; that whereas this board ruled and refused to allow this affiant, his associates, or their clients, to use, inspect, or examine said petition except in the presence of this board or of the petitioners and their attorneys, the defendants having been unable to carefully inspect said petition, or prepare a full defense thereto; that affiant, so far as his trammelled position would admit, made examination of said petition and has compared what the petitioners pretend to be a copy of said petition with the original, and affiant says that said copy is not a true copy of the original; that even if said copy was a true copy, defendants could not determine from it whether the petition had been properly signed or not; that among other discoveries of irregularities it is apparent that a large list of the names signed to said petition are fraudulent, forged, and that this, with many other facts, cannot be fully determined from the petition itself. This affiant, for himself

and his associates, says that in view of the above facts, and in view of the character and nature of the case, the time granted for the inspection of said petition in which to prepare a defense thereto is wholly inadequate, wherefore affiant, for himself and on behalf of his associates and clients, now moves the court that further time be given them in which to examine said petition and prepare their defense thereto, and they be allowed full, free, and untrammelled use of said petition for such purpose."

The other attorneys for the plaintiffs also swore that the facts stated in the affidavit of Cole are true. There is no contradiction of this in the record, so that it will be regarded as true. Being unable to obtain time to examine the names on the petition the plaintiffs filed the following answer:

"In the matter of the petition of S. E. Coffman et al., praying for a calling of a special election to vote upon the question of removing and locating the county seat of Hitchcock county, Nebraska.

"Comes now Charles G. Crews, a resident elector and taxpayer of said Hitchcock county, Nebraska, for himself and on behalf of 550 other resident taxpayers and duly qualified voters of said Hitchcock county, and objects and remonstrates against this honorable board calling or proceeding to call an election upon the petition herein filed, and for cause assigns the following grounds of objection and remonstrance:

"1. Because the pretended petition is insufficient in law to authorize the calling of an election as prayed for therein.

"2. Said pretended petition is not signed by the requisite number of qualified resident voters of Hitchcock county, Nebraska, to authorize the calling of said election.

"3. That a large number, to-wit, 111, of said pretended petitioners are minors, persons under the age of twenty-one years.

"4. Because a large number, to-wit, 358, of said pre-

tended petitioners are and were non-residents of the county of Hitchcock, state of Nebraska.

"5. Because a large number of said pretended petitioners, to-wit, 600, were procured to sign said pretended petition by being misled, and on account of facts having been misrepresented to them and by unlawful and undue influences.

"6. Because 351 of said pretended petitioners were induced to sign said pretended petition by bribery, in this, to-wit, that the residents and property holders of Trenton represented that they would build a court house free of expense to the petitioners of the county.

"7. Because a large number, to-wit, 350, of said petitioners desire to withdraw their names from said pretended petition.

"8. Because there is now pending in the supreme court of the state of Nebraska another action between substantially the same parties and upon the same cause of action as the cause attempted to be set up in the petition herein, and the said cause of action pending is still undetermined and undecided.

"9. And these remonstrators deny that any of said pretended petitioners are resident electors and qualified voters of Hitchcock county, Nebraska; deny that said pretended petitioners, or any of them, reside at or upon the lands as described in said pretended petition; deny that the age of, residence, and time of residence in the county is correctly given; and especially deny that said pretended petition is signed by a number of qualified voters, electors, equal to three-fifths of the vote of Hitchcock county cast at the last general election.

"10. These remonstrators allege that a large number of said pretended petitioners, to-wit, 326, are fictitious names, and that no such persons reside, live, or exist in Hitchcock county.

"11. These remonstrators further allege that a large

number of said pretended petitioners, to-wit, 178, are foreigners, who have never become citizens of the United States, nor have they declared their intention to become citizens as by law required.

"12. That a large number, to-wit, 130, of said names that appear upon said petition were not signed by the persons themselves, nor were they signed to said pretended petition with their knowledge or consent, and were forged thereto; these defendants especially deny that the pretended certified copy of said petition tendered defendants' attorneys is a true copy, and allege the fact to be that upon such comparison as the defendants were able to make it was evident said pretended copy was not a true copy of said petition, all of which could have been proved had this board allowed the said pretended copy filed as part of the record, and these defendants say that by reason of the facts, that this court refused to allow them or their attorneys sufficient time to examine said petition, and in view of the further fact that the only examination that these defendants have been permitted to make of said petition was in the presence of the petitioners and their attorneys, and this board, on account of the amount of matter contained in said petition, it is beyond the power of the defendants to make this answer more specific, definite, and certain.

"Wherefore your remonstrators pray that a time be set for hearing the issues raised by the remonstrance herein to said pretended petition; that a reasonable time be given these remonstrators to prepare their defense and procure their evidence to sustain the same; that upon the final hearing of said issue said pretended petition and the prayer thereof be overruled and that said pretended petition be dismissed."

This was duly verified. The answer was overruled and the election called. The case was taken on error to the district court, where a large amount of testimony was taken by the defendants in error and the action of the county commissioners affirmed.

Section 1, article 3, chapter 17, Compiled Statutes, provides: "Whenever the inhabitants of any county are desirous of changing their county seat, and upon petitions therefor being presented to the county commissioners, signed by resident electors of said county, equal in number to three-fifths of all the votes cast in said county at the last general election held therein, said petition shall contain, in addition to the names of the petitioners, the section, township, and range on which, or town or city in which the petitioners reside, their ages and time of residence in the county, it shall be the duty of such board of commissioners to forthwith call a special election in said county for the purpose of submitting to the qualified electors thereof the question of the relocation of the county seat. Notice of the time and the places of holding said election shall be given in the same manner, and said election shall be conducted in all respects the same as is provided by law relating to general elections for county purposes. The electors at said election shall designate on their ballots what city, town, or place they desire said county seat located at or in, and any place receiving three-fifths of all the votes cast shall become and remain, from and after the first day of the third month next succeeding such election, the county seat of said county." It will be observed that the petition is to be signed by "resident" electors, and in order to show that they are such the locality where each one resides must be stated in the petition. A petition signed by three-fifths of the resident electors of the county therefore is essential to give the county board jurisdiction. To be an elector of the county is not enough, he must be a resident elector. The object of this provision no doubt was to prevent any action being taken on a petition signed by persons temporarily residing in a county, such as persons engaged in constructing a railroad and who would leave as soon as the work was finished. (*Ayers v. Moan*, 34 Neb., 210.) To ascertain if the signers or any consid-

erable part of them are resident electors, where that fact is denied, may require a reasonable time to examine the names and make inquiry in regard to the same. The presentation of a petition signed by the requisite number of names, where no objection is made, no doubt will be sufficient to justify the board in calling an election. Where, however, an answer is filed containing charges of fraud that many of the names are fictitious, forged, or those of minors or persons not electors, time must be given to produce evidence of those charges.

In *State v. Nemaha County*, 10 Neb., 35, it is said: "If parties have been induced by misrepresentation to sign such petition, they may undoubtedly go before the board and state the facts as to such misrepresentations and demand that their names be stricken from the petition or not counted as petitioners. The commissioners should not call an election for such purpose, unless they find at the time of calling said election that more than three-fifths of the voters, as shown by the return of the last general election, are then petitioners in favor of such election. It is not the intention of the law to subject the people of a county to expense, annoyance, and animosities not unfrequently attending an election for the relocation of a county seat, unless it shall appear that the requisite number of voters at the time of calling the same are in favor of such election. The petition is only a means of determining that at least three-fifths of the legal voters of a county are in favor of the relocation of a county seat, and that an election called for the purpose of submitting such question to the people of the county will in all probability result in a relocation of the county seat." What is said in that case is applicable in this. If there are in fact more than three-fifths of the resident electors in favor of removing the county seat and have signed a petition for that purpose, there will be no occasion for undue haste in acting upon the petition. It will bear the closest scrutiny, and when an election is called in

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pursuance thereof the result will not be uncertain. On the other hand, if the petition is signed by persons who are not resident electors, or minors, and names of fictitious persons added, it may be expected that those presenting the petition will urge haste in acting upon it, so that the names cannot be scrutinized, and false, fictitious, and fraudulent names, if such there be, stricken out. If the position contended for by the defendants' attorneys should be established as the law, viz., that there is no authority to sift out the spurious names on the petition, then it would be possible for one person to file a petition for the removal of a county seat with fictitious names and imaginary places of residence and file the same with the county board, whose duty it would thereupon be to call an election for the purpose indicated. No one will contend that such a petition would not be open to examination; yet, suppose that one-half, one-fourth, or any other number, was fraudulent or fictitious, the right and duty to strike them from the petition must exist as a means of protecting the county board from being imposed upon and the people of the county from the animosities, strife, and expense of a needless county seat election. This examination is to be made before the county board.

In *Ellis v. Karl*, 7 Neb., 388, Judge LAKE, in speaking for the court, says: "It appears that in the exercise of the jurisdiction thus conferred the commissioners received the petition for relocation, and adjudging it in all respects sufficient, made and entered of record this order: 'Whereas, on the 20th day of August, 1877, was presented by Samuel Windrom to the board of county commissioners of Saline county a petition calling for a relocation of the county seat, which said petition was signed in manner required by law by citizens of said county in number more than three-fifths of the votes cast at the last general election.' Thereupon, at the same time, they ordered in due form the calling of the first election on this question, to be held on the 4th of September, 1877.

"It does not appear that either the genuineness or the sufficiency of the petition was questioned before the commissioners, but it is alleged that all of the defects complained of were fully known to them when they made the order for the election. And it is further alleged that the plaintiffs were wholly ignorant concerning them until more than twenty days had elapsed after the decision had been made, which seems to be thought a sufficient excuse for not moving earlier in this attack upon the action of the board.

"We are of the opinion that under this statute the proper place to have raised these questions concerning the petition was before the commissioners themselves, and that, having failed to make the objections there, and no sufficient reason for the failure being shown, the plaintiffs are in no situation to ask the aid of a court of equity."

Any resident elector of a county has a right to examine a petition filed with the county clerk which purports to contain the names and places of residence of a sufficient number of resident electors to require the county board to call an election for the removal of the county seat. This, by the act of filing, becomes a public document and is open to inspection, and a reasonable time must be given when desired for that purpose. The petition is in the care of the county clerk and he is responsible for its safe keeping, but the instrument may be examined in his office at any or all times during business hours, and five days on the showing made by the plaintiffs would not seem an unreasonable time to make a thorough examination of 860 names scattered, as they purport to be, over all parts of the county. Considerable stress is laid upon the offer to furnish a certified copy of the petition to the plaintiff, but that is not sufficient. The party has the right to inspect the original, to observe the several signatures and see if they purport to have been signed by each individual; in other words, if they appear to be genuine, or are in the handwriting of a few inter-

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ested persons. This is one of the means of detecting spurious signatures and a certified copy is not sufficient.

In *State v. Nelson*, 21 Neb., 572, a petition purporting to contain the names of 644 resident electors was presented to the county board asking to call a special election for the relocation of the county seat; the whole number of votes cast in said county at the preceding election was 729. A remonstrance against calling such election, signed by a very large number of persons purporting to be electors of said county, was presented to the county board, in which it was alleged that the petition was signed by non-residents, minors, and other persons not authorized to sign the same. The board thereupon investigated the matter and found that many persons who did not possess the necessary qualifications had signed said petition, and the number of resident electors who had signed the same was less than three-fifths of all the votes cast at the preceding election, and therefore refused to call the election, and this court sustained the order.

The case at bar, in many of its features, is like that of *Ayres v. Moan*, 34 Neb., 210. In that case the same undue haste was shown by the county board as in this, and a refusal of such board to permit electors to examine the petition and sift out the illegal names. The remonstrators thereupon filed an answer similar in many respects to that in this case. The county board overruled the answer and called an election, and the action of the board was sustained by the district court, but this court reversed all the proceedings and set the election aside. The same rule will be applied in this case. To justify a county board in calling an election for the relocation of the county seat it must clearly appear that the petition for such election is signed by at least three-fifths of the resident electors in the county, as shown by the votes cast at the preceding election. Good faith on the part of the county board requires it to act as an impartial tribunal, to be governed by the

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evidence in the case, and to give all the resident electors in the county a reasonable opportunity to show that names signed to the petition are forgeries, fraudulent, or fictitious, or that they are those of *bona fide* resident electors of said county. The judgment of the district court and also of the county commissioners is reversed and the cause remanded to the county board of Hitchcock county for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. L. P. MAIN, V. LORENZO
CROUNSE, GOVERNOR.

36	835
59	497

FILED MAY 1, 1893. No. 6067.

Statutes: ENACTMENT: APPROVAL OF GOVERNOR. The governor is a part of the law-making power of the state, and every bill, before it becomes a law, even if passed by a two-thirds majority of each house, must be approved by him, passed over his veto, or remain in his hands more than five days, Sundays excepted.

ORIGINAL application for *mandamus*.

L. P. Main and *R. A. Moore*, for relator.

George H. Hastings, *contra*.

MAXWELL, CH. J.

This is an action to compel the governor to appoint an additional judge in the twelfth district, notwithstanding his veto of the bill providing for such additional judge, and failure of the legislature to pass the bill over the veto. It is alleged in the petition that "The relator, L. P. Main

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represents to the court that he is a citizen of the United States and of the state of Nebraska, and a resident of Buffalo county in said state; that the defendant, Lorenzo Crounse, is the governor of the said state of Nebraska, duly elected and qualified; that the twelfth judicial district in said state comprises the counties of Buffalo, Custer, Dawson, and Sherman; that on or about the 1st day of March, 1893, a bill dividing the said state of Nebraska into judicial districts and providing for the appointment of an additional judge in said twelfth district was pending in the lower house of the state legislature of Nebraska, which was then in regular session, and on or about the date aforesaid was passed by said house; that thereafter and about the 8th day of March, 1893, said bill was passed by the senate of the state of Nebraska; that upon the passage of said bill in each house of the state legislature the yeas and nays were entered on the journal and said bill received the affirmative vote of more than two-thirds of the members elected to each house as required by the constitution of said state; that said bill contained a provision whereby it became effective immediately upon its passage by said state legislature, and also contained a provision requiring the governor of said state to appoint said additional judge immediately after the passage of said act; that the defendant has failed, neglected, and refused, and does still refuse, to appoint said additional judge in said twelfth judicial district, though often requested so to do; that relator has requested George H. Hastings, attorney general of said state, to bring this action or allow it to be brought in his name and he has refused so to do. Wherefore relator prays for a writ of *mandamus* requiring said defendant, as governor of the state of Nebraska, to appoint some legally qualified person to serve as judge in said twelfth judicial district."

To this petition the governor filed an answer as follows:

"Comes now Lorenzo Crounse and answering the petition for *mandamus* filed in the above entitled cause, says:

"1. He admits the relator, L. P. Main, is a citizen of the United States, of the state of Nebraska, and a resident of Buffalo county.

"2. That Lorenzo Crounse is the duly elected, qualified, and acting governor of the state of Nebraska.

"3. That the twelfth judicial district in the state of Nebraska comprises the counties of Buffalo, Custer, Dawson, and Sherman. That on or about January 21, 1893, a bill known as house roll No. 172, for an act to amend section 226 of chapter 3 of the Consolidated Statutes of Nebraska, by providing for an additional judge in the twelfth judicial district of said state, was duly introduced in the lower house of the twenty-third legislative assembly of Nebraska, which twenty-third legislative assembly was then in regular session; that on February 28, 1893, said bill entitled house roll No. 172 passed the lower house of the said twenty-third legislative assembly of Nebraska; that thereafter and on or about March 9, 1893, the said bill known as house roll No. 172 passed the upper house or the senate of the twenty-third legislative assembly; that said bill was duly presented to the governor of the state of Nebraska on or about the 10th day of March, 1893, and that after careful consideration, this respondent, as the said governor of the said state, did, for good and sufficient reasons, veto said bill, known as house roll No. 172, and that on said 13th day of March, 1893, said bill known as house roll No. 172, together with the veto message containing the objections of this respondent to the said bill, was duly returned to the lower house of the twenty-third legislative assembly of said state; that thereupon and in the manner provided by law the said bill known as house roll No. 172 was duly considered by said lower house of the twenty-third legislative assembly of Nebraska and the said veto of the said governor was by said body sustained; and thereupon and for said reasons said bill failed to become a law, and failed to pass the legislature, in the manner and as provided by the

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constitution and laws of the state of Nebraska, and that it is true that this respondent has failed and refused to appoint an additional judge in the twelfth judicial district of the state of Nebraska, for the reason that there is no vacancy in said office, and no law authorizing or empowering this respondent to make such an appointment, and this respondent denies that he has any right or authority whatever for making such an appointment."

The relator demurred to the answer on the ground that the facts stated therein did not constitute a defense to the action.

Section 15, article 5, of the constitution provides: "Every bill passed by the legislature, before it becomes a law, and every order, resolution, or vote to which the concurrence of both houses may be necessary (except on questions of adjournment) shall be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider the bill. If then three-fifths of the members elected agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by three-fifths of the members elected to that house it shall become a law, notwithstanding the objections of the governor. In all such cases the vote of each house shall be determined by yeas and nays, to be entered upon the journal."

Section 11, article 6, provides: "The legislature, whenever two-thirds of the members elected to each house shall concur therein, may, in or after the year one thousand eight hundred and eighty, and not oftener than once in every four years, increase the number of judges of the district courts, and the judicial districts of the state. Such districts shall be formed of compact territory, and bounded by county lines; and such increase, or any change in the

boundaries of a district, shall not vacate the office of any judge."

The relator's position is that the language of the section providing that the legislature may do that which in this case they have sought to do whenever two-thirds of the members elected to each house concur therein, is inconsistent with the provision requiring the executive approval of all laws, and that therefore a law of this kind can become operative upon its passage by both houses by a two-thirds majority. It is contended by him that not only would this seem to be in accordance with the constitution, but it is supported by reason, and whenever a reason for a rule ceases the rule also ceases, and certainly there can be no reason for submitting to the governor for his approval an act which to secure its original passage requires a larger number of votes than are required to pass any bill over the executive veto, and that there is authority for this position.

In *Hall v. City of Racine*, 50 N. W. Rep., 1094, the supreme court of Wisconsin discussed this question. The case arose over a municipal ordinance, which, from its peculiar nature, required a three-fourths vote of all the members elected to the council, and the court held that inasmuch as two-thirds of the members elected to the council were sufficient to pass the ordinance over the veto of the mayor, the ordinance having necessarily received a larger number of votes than were necessary to pass it over the veto of the mayor, became operative without submission to the mayor, and in discussing the question the court held that a similar provision in the state constitution will be similarly construed, saying the approved rules, both of statutory and constitutional construction, require that the special provision should be given full force whenever it is inconsistent with the general provision, and that the law would not require a useless thing, namely, the submission of a bill of this kind to the governor of a state or the

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mayor of a city. We have great respect for the decisions of the supreme court of Wisconsin, and find frequent occasion to quote from and approve the same, but in the case cited it seems to us that the court overlooked an important fact, viz., that the officer whose approval is necessary in the first instance, and who has authority to veto any measure which it is proposed to enact into a general or local law is a part of the law-making power. To him as well as the deliberative body passing the law is confided the duty of scrutinizing its details and considering the effect it may have. Particularly is this true as applied to the governor of a state. To him as well as to the legislature is confided the business of making laws. He is elected by the electors of the entire state and is presumed to have been chosen because of his fitness for the position. He represents the people of the state at large, and not particularly those of any locality. He is in a position therefore to judge impartially as to the necessity or expediency of creating additional judges of the district court. While it is true that the bill providing for such judges must be approved by two-thirds of the members elected to each house, while three-fifths may pass the bill over the governor's veto, yet, when the governor returns a bill to the legislature without his approval, he is required to state his reasons for not approving the same. These reasons are presumably valid and may, and probably will, have the effect, as in this case, to convince a sufficient number of members who may have voted for it at first to refuse to vote for it against the governor's objections. In which case it would fail to become a law. An act which is demanded by the public will no doubt receive the necessary votes, while if not so required it is best that it should fail. The signature of the governor was necessary, therefore, to the bill in question, or that it should pass over his objections. The bill, therefore, did not become a law, and the writ must be denied.

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It is alleged that there is a very large amount of business in the twelfth district and that another judge is necessary therein to dispose of the same. The governor in his veto message, returning the bill without his signature, calls attention to the fact that there are more judges in some of the districts than the business demands, and that the law authorizes judges of one district to hold court in another district. He also calls attention to the late case of *Tippey v. State*, 35 Neb., 368, in which it was held that different judges could hold court in the several counties of a judicial district at the same time. Our constitution and statutes place but few restrictions upon this right. There are four counties in the twelfth district. The judge of that district, therefore, may call to his aid three other judges from districts where the business is disposed of, and it is perhaps probable that the governor has power to require them to perform such duties. No doubt a request would be all that would be necessary.

WRIT DENIED.

THE other judges concur.

J 5-269

EDNA C. ARNOLD V. BADGER LUMBER COMPANY ET AL.

FILED MAY 2, 1893. No. 4034.

Pleading: CROSS-PETITION FILED AFTER ANSWER DAY: DEFAULT: NOTICE TO CO-DEFENDANTS. After answer day, if a defendant files a pleading, in the nature of a cross-petition, against his co-defendants who have not appeared in the action, such co-defendants can be concluded in respect thereto, only by their appearance, or after the service on them of a notice in the nature of a summons, as to such pleading.

ERROR from the district court of Lancaster county.
Tried below before FIELD, J.

36	841
40	156
36	841
42	722
43	778
36	841
d45	336
45	383
36	841
48	56
36	841
51	420

Arnold v. Badger Lumber Co.

Ores M. Quackenbush and J. E. Philpott, for plaintiff in error.

B. F. Johnson, contra.

RYAN, C.

On December 26, 1889, the Badger Lumber Company filed in the district court of Lancaster county its petition for the foreclosure of its claim for a mechanic's lien on lot 10, block 5, in Sunnyside addition to the city of Lincoln. Edna C. Arnold was made defendant, as the owner of the said lot, while W. H. Tyler, F. W. Kent, S. J. Kent, George R. Miller, John Smith Sperry, B. G. Wright, and R. S. Young were joined as defendants, by reason of being claimants of liens on the same property. A summons was issued requiring the defendants to answer by the 22d day of April, 1889, which was in due time served on each of the defendants. Edna C. Arnold made no appearance and the decree complained of was rendered against her upon her default. On April 24, 1889, W. H. Tyler filed his answer, claiming the foreclosure of a mechanic's lien on the property described. On April 24, 1889, R. S. Young also answered the petition, asking the enforcement of his claim to a like lien. B. G. Wright and F. W. Kent filed a like answer, each for himself, on May 27, 1889. George R. Miller filed an answer of like purport on May 23, 1889, and on June 4, 1889, an answer and cross-petition with the same purpose was filed by J. S. Sperry. Finally, on November 21, 1889, the date of the decree, there was filed on behalf of S. J. Kent an answer and cross-petition for the same relief as had been asked by the other defendants as against Edna C. Arnold. Except as to the claim of the Badger Lumber Company no summons was issued, nor was notice of any kind served upon Edna C. Arnold, the owner of the property; neither did she in any manner appear for any purpose. The summons issued as to the

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petition of the Badger Lumber Company required the defendants and each of them to answer by April 22, 1889; the first answer was filed two days afterward; from thenceforward they were dropped in until November 21, following. A decree was, on the date last named, entered in favor of each of the parties, who, as above, claimed liens against the lot in question. The judgment, in so far as it was in favor of each of the co-defendants of Edna C. Arnold, must be reversed, for reasons which will now be briefly stated.

In *Hapgood v. Ellis*, 11 Neb., 131, the rule was broadly stated that any defendant, regularly served with process, who fails to answer any material allegation contained in the answer of his co-defendant, is bound thereby, as well as by the decree founded thereon, and unless he appeals therefrom, the same becomes as to him *res adjudicata*.

In the *Cockle Separator Mfg. Co. v. Clark*, 23 Neb., 702, this broad statement was qualified thus: "While all parties to an action are bound to take notice of pleadings *properly filed within the time required by law*, yet, where a party in default obtains leave of court to file a pleading affecting other parties, the parties so affected should be notified of the filing of such pleading, unless such persons or their attorneys are present when the order is made." The decree which had been taken, as between the co-defendants, upon the answer of a co-defendant filed after the time when answers were required by law to be filed, and as to which no notice had been served or appearance made, was held properly to have been set aside in the district court. As between co-defendants, therefore, the rule is established that each is bound to take notice of such pleadings as shall be filed on or before the answer day named in the summons issued upon the original petition. After answer day, if a defendant files a pleading in the nature of a cross-petition against his co-defendants, who have made no appearance, such co-defendants can only be thereby affected by their

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appearance as to such pleading, or after the service of a notice upon them in the nature of a summons, as to such pleading.

By the decree under consideration the co-defendants of Edna C. Arnold obtained affirmative relief as against herself and her property, after answer day, without her appearance, and without notice to her of the filing of the several answers asking such affirmative relief. It follows, therefore, that such part of the judgment must be and is reversed.

No objection having been made or discovered as to that part of the decree which enforces the right of the Badger Lumber Company to relief, it is affirmed.

JUDGMENT ACCORDINGLY.

THE other commissioners concur.

PALMER, RICHMAN & COMPANY V. CHARLES B. RICE.

FILED MAY 2, 1893. No. 4783.

1. **Letters of Credit: COMPLIANCE WITH CONDITIONS:** A CONTRACT TO ACCEPT DRAFTS, thereafter to be drawn upon certain conditions, can be made the basis of a recovery by the payee of such drafts, only upon showing full and exact compliance with each of said conditions.
2. ———: **CONTRACT TO PAY DRAFTS: LIABILITY.** A party who contracts in writing to accept and pay such drafts as shall be drawn by a party named, in favor of another party also named, upon compliance with certain conditions, is absolutely liable upon drafts drawn as contemplated, irrespective of the condition of the general account between the drawer and drawee at the time such drafts are made.

ERROR from the district court of Douglas county. Tried below before DOANE, J.

Chas. Offutt, for plaintiff in error, cited: *Von Phul v. Sloan*, 2 Robinson [La.], 148, 38 Am. Dec., 207; *Coolidge v. Payson*, 2 Wheat. [U. S.], 75; Story, Bills of Ex. [4th ed.], sec. 249; *Schimmelpennich v. Bayard*, 1 Pet. [U. S.], 284; *Boyce v. Edwards*, 4 Id., 118; *Franklin Bank v. Lynch*, 52 Md., 270; *Murdock v. Mills*, 11 Met. [Mass.], 14; *Potts v. Whitehead*, 23 N. J. Eq., 514; Anson, Contracts [2d Am. ed.], p. 22, 19*; *Jordon v. Norton*, 4 M. & W. [Eng. Exc. Rep.], 155; *Hutchison v. Bowker*, 5 Id., 535; Tiedeman, Commercial Paper [ed. 1889], sec. 228; *First National Bank v. Bensley*, 2 Fed. Rep., 609; *Hatfield v. Phillips*, 9 M. & W. [Eng. Exc. Rep.], 648; *Ulster County Bank v. McFarlan*, 5 Hill [N. Y.], 432; *Nixon v. Palmer*, 4 Seld. [N. Y.], 398; *Fenn v. Harrison*, 3 T. R. [Eng.], 757; *Attwood v. Munnings*, 7 Barn. & Cres. [Eng.], 278.

Gregory, Day & Day and Charles B. Rice, contra.

RYAN, C.

On the date therein named the plaintiffs in error executed the following instrument in writing:

"SOUTH OMAHA, NEB., April 19, 1888.

"*Chas. B. Rice, Endicott, Neb.*: Until further notice we will pay H. C. Dawson's drafts for cost of stock consigned to us, bill of lading attached when presented.

"Yours truly, PALMER, RICHMAN & Co.

"BLANCHARD."

The evidence shows that anterior to the above date Palmer, Richman & Co. had given a more unlimited letter of credit to the Endicott Bank in favor of H. C. Dawson, which was superseded by that above set out, upon the suggestion of Mr. Blanchard, a member of said firm, upon its date; that after April 19, 1888, H. C. Dawson bought and shipped cattle and hogs to Palmer, Richman & Co., a live stock commission firm doing business at South Omaha,

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Nebraska; that the Endicott Bank, which was but another name for Charles B. Rice, advanced the money to pay checks issued by H. C. Dawson for stock purchased by him; that the commission upon handling said stock at South Omaha was divided between said firm and H. C. Dawson; that upon the purchases being completed it was usual for H. C. Dawson to draw upon Palmer, Richman & Co. for the amounts expended to make such purchases for each shipment, in favor of the Endicott Bank, by which such drafts were forwarded accompanied by a bill of lading, upon which the same were paid by Palmer, Richman & Co.; that upon one occasion the bill of lading was omitted, whereupon Palmer, Richman & Co. expostulated with said bank in respect to said omission. These shipments were continued until August 13, 1888, when there was drawn a draft as follows:

"\$1,400.

"THE ENDICOTT BANK,

"ENDICOTT, NEB., Aug. 13, 1888.

"Pay to the order of the Endicott Bank fourteen hundred and $\frac{10}{100}$ dollars.

H. C. DAWSON.

"To Palmer, Richman & Co., South Omaha, Neb."

The advances covered by the above draft, it is claimed by defendant in error, were made previous to and ending with August 10, 1888. It is certain that the car of cattle and car of hogs shipped on August 10, 1888, were received by the plaintiffs in error at 6 o'clock in the forenoon of the next day, and were sold the same day for \$1,604.45 net. The proceeds of this sale the plaintiffs in error applied toward the payment of a draft for \$1,700 drawn upon them by H. C. Dawson, of date August 6, 1888, and accepted August 8. This draft is marked paid August 11, 1888. To this draft no bill of lading was attached. When this application of the net proceeds of the sale of the cattle and hogs had been made it left Dawson overdrawn with plaintiffs in error \$656, according to the evidence of Mr. Blanchard.

About the 13th day of August, 1888, the defendant in error procured from the agent of the railroad company over whose line the above two cars of stock had been shipped, a bill of lading for the same, which, with the aforesaid draft for \$1,400, was forwarded to South Omaha. On the 15th day of August, 1888, the said draft, accompanied by said bill of lading, was presented to the plaintiffs in error for payment, and payment was refused; whereupon suit was brought upon the letter of credit aforesaid for the amount of said draft and protest fees. On the 22d day of May, 1890, a verdict was found by the jury in favor of the defendant in error for the sum of \$1,573.49, upon which judgment was duly rendered.

Plaintiffs in error contend that as this suit was in effect upon an agreement to accept drafts to be drawn on certain conditions, it must be shown, as a condition precedent to the right of recovery, that said condition has been fully and exactly complied with by the party claiming its benefits. Without doubt this position is correct. To entitle plaintiff to recover upon an agreement to accept future drafts for stock purchased with bill of lading attached it was incumbent upon the plaintiff to show affirmatively that the draft was for stock purchased, and such draft must have been accompanied by a bill of lading. The contract of the parties required the concurrence of these conditions—nothing could dispense with either of them—and the jury was so informed in the instructions of the court. There was evidence sufficient to sustain the verdict of the jury as to these conditions precedent; their finding, therefore, settled this fact in favor of the defendant in error.

Plaintiffs in error, however, strenuously insist that having paid the draft of \$1,700 drawn by H. C. Dawson on August 6, they should be protected as against the draft of date August 13, even though the latter draft alone was accompanied by a bill of lading. It is also contended that plaintiffs in error should have been permitted to show what

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was the state of the account between Palmer, Richman & Co. and Dawson just prior to the receipt of the two car loads of stock on the morning of August 11, as to which party was owing the other.

These contentions lose sight of the fact that the rights and liabilities of all the parties to the letter of credit are to be measured strictly by its terms. As counsel for plaintiffs in error has justly insisted, the plaintiff in the district court was entitled to recover only upon a strict compliance with the terms of the instrument upon which suit was brought. It devolved upon him to show affirmatively that the draft was for the cost of the stock shipped to Palmer, Richman & Co., and that a bill of lading accompanied the same. On the other hand, there was by the same agreement, devolved upon plaintiffs in error, the correlative duty of providing for payment of such drafts as should be drawn upon them within the strict terms of the letter of credit. The acceptance of all such drafts in advance was burdened with only two conditions: one that the draft should be for the cost of the stock shipped to Palmer, Richman & Co., the other was that a bill of lading should accompany this draft. Upon the one hand, plaintiffs in error could not be held to payment without strict compliance with each condition; on the other hand, upon compliance with said conditions by the defendant in error, the liability of the plaintiffs in error for the amount of the draft became absolute. If they paid a draft without requiring the bill of lading, they did not release themselves from payment of one accompanied by such bill, if it was for the cost of the stock shipped to them. Any other rule would engraft upon the letter of credit another condition. In the case at bar the engrafted condition which must of necessity be implied from the proof offered to be made as to the condition of the accounts on August 11, just before these two cars were received, was, that Dawson would not, on a general balance of account, be

Jones v. Stevens.

found owing plaintiffs in error. The same condition must be implied if the draft for \$1,700, drawn by H. C. Dawson on the 6th day of August, 1888, should have been taken into account by the jury to postpone the rights of defendant in error upon the draft of \$1,400 for the cost of stock, accompanied as it was by a bill of lading. The district court properly held that the terms of the letter of credit should alone determine the rights of the parties thereto, as between themselves, regardless of whatever advances plaintiffs in error may have made to Dawson independently of compliance with such conditions precedent as they themselves had prescribed. These considerations meet the contentions of the plaintiffs in error, without cumbering the record with details which would merely serve to show how the questions arose rather than what they were. It follows that the judgment of the district court must be and is

AFFIRMED.

THE other commissioners concur.

ALFRED D. JONES V. GROVER STEVENS.

FILED MAY 2, 1893. No. 5105.

1. **Real Estate Brokers: WHEN RIGHT TO COMPENSATION ACCRUES.** Where a real estate broker is employed to procure a purchaser of real property, he is entitled to compensation when he has secured a proposed purchaser ready, able, and willing to buy the property on the terms and conditions upon which the said broker is authorized to procure such purchaser. This right to compensation will not be impaired by the subsequent inability or unwillingness of the owner to consummate such sale on the terms prescribed.
2. **Witnesses: CROSS-EXAMINATION: EXCEPTION: DISCRETION OF TRIAL JUDGE.** The presiding judge, of necessity, is vested

Jones v. Stevens.

with a sound judicial discretion as to limiting the cross-examination of a witness, and where the same question has been three times propounded, it is not error to prohibit a like question to be again asked under penalty of forbidding further cross-examination. No exception thereto having been taken, there is in this court no reviewable question presented.

ERROR from the district court of Douglas county. Tried below before DAVIS, J.

C. A. Baldwin, for plaintiff in error.

Switzler & McIntosh, contra.

RYAN, C.

This was an action brought by Grover Stevens against A. D. Jones, for the sum of \$1,400 and interest thereon, alleged to have become due the said Stevens as compensation for having procured for Jones a purchaser for lot eight (8), in block one hundred forty (140), in the city of Omaha. The petition also alleges that said property was listed by Jones with Stevens, who was a real estate broker in Omaha, at the price of \$70,000, of which \$20,000 was to be paid in cash, the balance to be allowed to run at the option of the purchaser, but to draw seven (7) per cent interest per annum. It was also averred that Jones agreed that if Stevens would procure him a purchaser for said lot on said terms, Jones would pay Stevens \$1,400 for such services, and that, as required, he, the said Stevens, did procure a purchaser ready, able, and willing to take the lot on the terms proposed.

The answer admitted that at the time alleged, Stevens was a real estate broker, and denied each other averment made in the petition, and denied that Jones ever employed Stevens to procure a purchaser; and denied that Stevens ever did procure a purchaser able, ready, and willing to purchase on the terms for which Jones would sell.

There was a reply in general denial of the averments of the answer.

The examination of this case has been much simplified by the admission at the close of Mr. Sweezy's testimony as follows: "It is agreed that Mr. Sweezy was ready and able to make the bargain." As the gentleman last named was the proposed purchaser of said lot, who had been procured by Stevens to agree to take the same, there was thus admitted a compliance with two of the conditions necessary to a recovery upon the theory of the plaintiff in the district court. The other condition was, whether Mr. Sweezy was willing to take the property on the terms proposed. In relation to this requirement, counsel for plaintiff in error vigorously insists that the lot was incumbered to a large amount by reason of a general judgment against Jones, and on account of specific liens decreed against the property, and contends therefore that Sweezy refused to consummate the purchase. Upon this contention there was contradictory evidence. There was, however, a preponderance sufficient to establish the facts, that these incumbrances were talked over by Jones with Stevens, and also with Sweezy, and that Jones insisted that these would not prevent the consummation of the sale, for that Jones would use the avails of the sale to place the title in a condition satisfactory to Sweezy. The manner in which this was to be accomplished was by Jones stated to Sweezy, and by him approved, upon which Sweezy offered to arrange the matter at once, but Jones deferred further action until he should see his counsel. It is also established by a preponderance of the evidence that Jones stated to Sweezy that the lot was Sweezy's, immediately thereafter saying to defendant in error that he (Jones) would close up the matter, and that he (Stevens) was entitled to his commission. Undoubtedly it was thereafter found more impracticable to arrange as to the liens than Mr. Jones had anticipated, but that does not abridge Mr. Stevens' right to a commission if he had already earned it. The instructions very aptly stated the issues and the law applicable thereto. True, the

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plaintiff in error criticises these instructions and requested others, on the theory that it was necessary for Stevens to have accomplished a sale of the lot; to secure a proposed purchaser ready, able, and willing to buy on the prescribed terms, not being, in his view, sufficient in law, or within the averments of the petition. It will be observed that as to the allegations of the petition this criticism is not well founded; as to the law applicable it is equally at fault. (*Vide Potvin v. Curran*, 13 Neb., 302.)

Complaint is made that the court improperly limited plaintiff in error's cross-examination of the defendant in error. The bill of exception shows that counsel for plaintiff in error asked this question: "When did you make this contract with Mr. Jones to sell this property?" which was answered, "When he listed the property." The question was immediately repeated, and an objection thereto was sustained and an exception taken. Very soon thereafter this question was again repeated, whereupon the presiding judge said, after an objection and exception had again been noted, "If you ask another question of that kind I will stop the cross-examination of this witness." No exception was taken to this announcement and the cross-examination thenceforward proceeded in an orderly manner. There is, therefore, no question for review properly presented by the record, nor does the plaintiff in error show that this announcement of a future intention, upon the happening of an event which in fact never did happen, prejudiced his rights in any manner or degree whatever. The presiding judge must be allowed a certain discretion in the limitation of the right of cross-examination, and we fail to see that this discretion has in any manner been abused.

The verdict is fully sustained by the evidence, there was no error in the rulings of the court, and the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

JACOB H. PHILLIPS, APPELLANT, v. MCKAIG & COMPANY ET AL., APPELLEES.

FILED MAY 2, 1893. No. 4702.

1. **Vendor and Vendee: JUDGMENTS: IMPERFECT INDEX AND DOCKET ENTRY: LIEN ON REAL ESTATE: CONSTRUCTIVE NOTICE.** The party's true name was Mary Ann Allely, and she held her real estate by conveyance of record under the name of Mary A. Allely. *Held*, That a judgment against her, indexed and docketed in the office of the clerk of the district court, "McKaig & Co. v. May Alley," was not constructive notice to a purchaser of the real estate from Mary Ann Allely.
2. **Deeds: IDENTITY OF NAMES: BONA FIDE PURCHASERS: DEFECTIVE INDEX OF JUDGMENT: CONSTRUCTIVE NOTICE.** The indexes in the office of the register of deeds disclosed conveyances as follows: "—— to Mary A. Allely, deed; Mary A. Allely to Hooper, mortgage; Mary A. Allely to Vickers, mortgage." *Held*, That Vickers, by taking a deed of the real estate from Mary A. Allely, so described in body and acknowledgment of the deed, but signed Mary A. Alley, was not thereby charged with notice that a judgment indexed in the office of the clerk of the district court against May Alley was against Mary A. Allely.

APPEAL from the district court of Lancaster county.
Heard below before FIELD, J.

J. A. Marshall, for appellant.

H. J. Whitmore, contra.

RAGAN, C.

This case was tried in the court below on an agreed statement of facts as follows:

"On the 24th day of September, 1887, a person whose correct name is Mary Ann Allely became seized in fee-simple of lot eight (8), in block one (1), in East Park addition to the city of Lincoln, located in Lancaster county, in the state of Nebraska. The deed conveying said lot to

said Mary Ann Allely described her by the name of Mary A. Allely.

"On the 4th day of January, 1888, the said Mary Ann Allely made, executed, and delivered a mortgage on said lot to C. L. Hooper, in which she signed the instrument as Mary A. Allely, and she is described in the body of the instrument and in the acknowledgment thereof as Mary A. Allely.

"On the 11th day of April, 1888, the said Mary Ann Allely executed and delivered a mortgage on said lot to Edwin L. Vickars, which she signed by the name of Mary A. Allely, and is by that name so described in the body of the instrument and in the acknowledgment thereof.

"On the 3d of August, 1888, the said Mary Ann Allely made, executed, and delivered to the said Edwin L. Vickars a warranty deed, conveying said lot to said Vickars, which deed she signed by the name of Mary A. Alley, but in the body of the instrument and in the acknowledgment of said deed she is described as Mary A. Allely.

"On the 11th of August, 1888, the said Edwin L. Vickars and wife, by warranty deed, duly conveyed said lot to Henry D. Pierson.

"On the 13th of December, 1888, the said Henry D. Pierson and wife, by warranty deed, duly conveyed said lot to the plaintiff, who hath ever since been and still is the owner and in possession of said lot.

"Neither the said Edwin L. Vickars, Henry D. Pierson, or this plaintiff ever had any knowledge of any judgment in favor of McKaig & Co. and against the said Mary Ann Allely, except such constructive notice as they were charged with by the judgment records and index of the clerk of the district court of Lancaster county, Nebraska, nor did either of them know that the said Mary Ann Allely ever signed her name May Alley, except such constructive notice as they may be charged with by the public records of Lancaster county, Nebraska.

Phillips v. McKaig.

"The said Mary Ann Allely, when she executed said instruments, was a woman between sixty and seventy years of age, her eyesight was poor, her hand trembled, and she wrote with difficulty, and was quite illiterate.

"On the — day of April, 1888, the defendants McKaig & Co. sued the said Mary Ann Allely by the name of May Alley on a note alleged to have been signed by her 'May Alley,' and on April 16, 1888, obtained a judgment against her by default for \$46.64, and \$2.75 costs, before S. T. Cochran, Esq., J. P., Lancaster county, Nebraska, of which judgment a transcript was duly filed in the office of the clerk of the district court of Lancaster county, Nebraska, on the 21st day of May, 1888, which judgment appears recorded and indexed only as a judgment against May Alley and in favor of McKaig & Co. in the records of the clerk of the district court of the said Lancaster county, Nebraska; and on the same page of the judgment index in said office of the clerk of the district court, and on the next line above appears a satisfied judgment in favor of Thomas Allely and against the said Mary Ann Allely by those names so described; but in this action she signed the petition for alimony as May A. Alley.

"On the — day of January, 1891, the defendants McKaig & Co., by their attorney, H. J. Whitmore, caused a writ of execution to issue out of the said district court of Lancaster county, Nebraska, upon said judgment in favor of McKaig & Co. and against said May Alley, and placed said writ in the hands of Sam McClay, sheriff of Lancaster county, Nebraska, and caused him to levy upon said lot eight (8), block one (1), East Park addition to Lincoln, and to proceed to sell the same to satisfy their said judgment and execution, as provided by law for the sale of real estate upon execution, and are now only restrained from so doing by the restraint of the court in this action, alleging and claiming their said judgment is a lien prior and adverse to any title of the plaintiff to the said real estate."

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The court rendered a decree dissolving the temporary injunction and dismissing the appellant's cause of action, who brings the case here on appeal.

The questions then are :

1. What notice of a judgment against Mary Ann Allely did the indexing of the judgment in favor of McKaig & Co. against May Alley afford Vickars, the intending purchaser of this property?

We answer, none.

2. What notice did the records in the office of the register of deeds impart to Vickars, the intending purchaser of this property, that Mary Ann Allely was May Alley?

(a) ——— to Mary A. Allely, a deed; (b) Mary A. Allely to Hooper, a mortgage; (c) Mary A. Allely to Edwin L. Vickars, a mortgage.

"The purport of the decisions appears to be that the sufficient degree of accuracy is attained if an intending purchaser, exercising a reasonable degree of care and a reasonable amount of intelligence in making a search, could not fail to be apprised of the existence and character of the judgment." (1 Black, Judgments, sec. 406.)

In *Metz v. State Bank of Brownville*, 7 Neb., 165, the present chief justice, speaking for the court, says: "The subsequent purchaser is affected with such notice as the index entries afford, and if they are of such a character as would induce a cautious and prudent man to make an examination of the title, he must make such investigation."

Applying the rule above laid down to the facts in this case, it appears to us that Vickars, *intending* to buy this property and examining the records, would find nothing of such a character as would arouse the suspicions of a cautious and prudent man that Mary Ann Allely and May Alley were the same person; and the fact that the deed by which she finally conveyed him the property was signed by her "Mary A. Alley," instead of Mary A. Allely or Mary Ann Allely, she being then between sixty and seventy

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years of age, her eyesight poor, her hand trembling, writing with difficulty, and being quite illiterate, was not of itself sufficient to put Vickars upon further inquiry. It follows, therefore, that the decree of the district court must be reversed and this case remanded thereto, with instructions to enter a decree in favor of the appellant, as prayed for in his petition. It is so ordered.

REVERSED AND REMANDED.

THE other commissioners concur.

FRED W. GRAY V. M. A. DISBROW & COMPANY.

FILED MAY 2, 1893. No. 4912.

Equity: REVIEW BY PROCEEDING IN ERROR: MOTION FOR NEW TRIAL. In order to review the proceedings in the trial of an equity case by a petition in error, a motion for a new trial must be filed, as in an action at law. (*Carlou v. Aultman*, 28 Neb., 672.)

ERROR from the district court of Douglas county. Tried below before WAKELEY, J.

Wharton & Baird, for plaintiff in error.

Montgomery, Charlton & Hall, contra.

RAGAN, C.

The decree which is sought to be reviewed in this case was rendered in the court below on the 14th of January, 1891, and a transcript of the evidence and the proceedings of the court below was filed in this court August 21, 1891. More than six months having elapsed between the date of

36	857
40	792
41	196
36	857
43	47
38	857
53	358

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the rendition of said decree and the filing in this court of the transcript of the proceedings and evidence, this case cannot be tried here as an appeal. It appears also, from looking into the record, that no motion for a new trial was filed in the court below. We are, therefore, precluded from examining the testimony to see if the decree is supported by the evidence. (*Carlow v. Aultman*, 28 Neb., 672.) The judgment of the district court is therefore in all things

AFFIRMED.

THE other commissioners concur.

36	858
40	63
36	858
47	768
36	858
49	507
53	858
56	835
56	781
36	858
58	537

RIVERSIDE COAL COMPANY V. LEONIDAS K. HOLMES.

FILED MAY 2, 1893. No. 4852.

1. **Review: SUFFICIENCY OF ASSIGNMENT OF ERROR: MOTION FOR NEW TRIAL.** The statutory assignment, in a motion for a new trial, of "errors of law occurring at the trial and duly excepted to," is sufficient to present for review the ruling of the court upon a demurrer *ore tenus* interposed before the introduction of any evidence.
2. **Contract of Sale: DAMAGES FOR BREACH: PLEADING.** In an action for damages for refusing to deliver goods in pursuance of a contract of sale, where no consequential damages are claimed, it is not necessary to allege the market value of the goods.
3. **Assignment of Error.** The failure of a jury, in assessing the amount of recovery, to allow interest upon a sum due upon contract is not presented for review by the assignment, in a motion for a new trial, that the verdict is not supported by sufficient evidence.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

W. B. Comstock, for plaintiff in error.

H. J. Whitmore, contra.

IRVINE, C.

The plaintiff in error began this action to recover the sum of \$68.86 with interest, for coal sold and delivered by plaintiff to defendant. The defendant by answer admitted his indebtedness to plaintiff as alleged in the petition and counter-claimed for damages, alleging that in April, 1888, a contract was entered into between the parties whereby the plaintiff agreed to furnish to defendant all coal that defendant should require in his brick yards during the season of 1888 at an agreed price of \$3 per ton; that plaintiff failed and refused to furnish such coal, and that defendant was unable to obtain the same except at a much higher price; that by reason of the failure of the plaintiff to comply with his contract the defendant was compelled to pay a much greater sum for the coal required by him in his business during said year, to his damage in the sum of \$200. A reply was filed which it is not necessary to set forth in order to an understanding of the questions presented for review. There was a verdict finding due the plaintiff upon its cause of action \$68.86, and to the defendant upon his counter-claim \$105.25, and a general finding for the defendant of the difference between these sums, \$36.39.

The admission in evidence of the deposition of John Weihe is assigned as error. Objection was made to the reading of this deposition when offered, whereupon a witness was called for the purpose of proving Weihe's inability to be present at the trial. After this testimony was taken there was no further objection to the reading of the deposition. Upon the contrary, the attorney for the plaintiff said, "I suppose if that is the fact, and he is unable to come, we will have to allow his deposition in." Thereupon the deposition was read without further objection or exception. This court cannot therefore pass upon the admissibility of this evidence.

Riverside Coal Co. v. Holmes.

The giving of certain instructions by the court of its own motion and the refusal to give certain instructions asked by the plaintiff are also assigned as error; but these questions were not presented to the trial court in the motion for a new trial, and therefore cannot be here considered.

Upon the opening of the trial the plaintiff objected to the introduction of any evidence in support of the counter-claim, for the reason that the answer did not contain sufficient facts to constitute a defense to plaintiff's action, or a cross action against it. This objection was overruled, and this action of the trial court is assigned as error. It is urged by defendant that the motion for a new trial is not sufficient to present this question, but by section 317 of the Code, as amended in 1881, it is sufficient in assigning the grounds of a motion for a new trial to state the same in the language of the statute without further particularity. If the ruling of the court was erroneous, it was an error of law occurring at the trial, an assignment which does appear in the motion for a new trial. Upon this point the plaintiff contends that the answer was insufficient, in not alleging the market value of the coal at the time and place, when and where it should have been delivered. The case of *Denver, T. & G. R. Co. v. Hutchins*, 31 Neb., 572, is cited in support of that view. That case was, however, based upon a failure to deliver goods purchased for the purpose of resale, and the damages sought to be recovered consisted of loss of profits. The attempt was to hold the vendor liable for consequential damages, and the court held that the counter-claim, in failing to allege the contract price and the market value, was insufficient to support such damages. At the common law general damages, such as the law presumes to arise, as being the natural and necessary result of the wrong complained of, were not required to be pleaded. Damages for breach of contract to buy or sell goods were within this rule.

(*Boorman v. Nash*, 9 B. & C. [Eng.], 145 (by Lord Tenterden); 1 Chitty, Pleading, 336.) The forms of declarations on such causes of action contained no averment of market value. (2 Chitty, Pleading, 269.) The Code has not changed the rules of pleading in this regard. (Maxwell, Code Pleading, pp. 79, 113.) Even if the counter-claim had been insufficient to justify the admission of evidence as to the actual damage, it very clearly alleged a breach of contract for which defendant would be entitled to nominal damages at least, and the demurrer *ore tenus* should have been overruled for that reason.

It is argued that the verdict cannot be sustained, for the reason that the jury failed to allow interest in computing the amount due the plaintiff on its petition. The only assignment of error, either in the motion for a new trial, or in the petition in error, which by any possible construction could be made to cover this point, is that the verdict is not supported by sufficient evidence. We do not think this assignment sufficient. It is true that in the case of *Burkholder v. Burkholder*, 25 Neb., 270, it is said that it is probable that the assignment that the verdict is not sustained by sufficient evidence liberally construed will cover the point that the verdict is excessive; but in *Volker v. First National Bank*, 26 Neb., 602, and in *Everett v. Tidball*, 34 Id., 803, it is distinctly held that errors in assessment of damages must be assigned in the motion for a new trial. Section 314 of the Code, providing grounds for a new trial, gives in the fifth subdivision, "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property." Here is a special ground assigned, evidently not meant to be included within the others; and where the error complained of was the failure to allow interest, it is very clear that such error should have been called by this appropriate assignment to the attention of the trial court, where it could have been readily

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corrected. Great injustice would be done by permitting the very general assignment of insufficiency of evidence to cover such a point, and lead to the reversal of a judgment in this court without requiring the precise question to be called to the attention of the trial judge.

AFFIRMED.

THE other commissioners concur.

36	868
39	822
139	509
36	862
49	842
36	862
44	131
56	869
45	48

OLIVER MAGGARD V. CHARLES R. VAN DUYN ET AL.

FILED MAY 2, 1893. No. 4585.

1. **Appeal From County Court: DISMISSAL IN APPELLATE COURT.** An appeal from the county court to the district court should be dismissed upon proper motion when the transcript was not filed within thirty days from the date of the judgment, and no reason is shown for the delay.
2. **Record for Review: BILL OF EXCEPTIONS: AFFIDAVITS** used on the hearing of a motion in the district court cannot be considered in the supreme court unless embodied in a bill of exceptions.

ERROR from the district court of Lancaster county.
Tried below before FIELD, J.

Edson Rich, for plaintiff in error.

Charles E. Magoon, contra.

IRVINE, C.

This was a case begun in the county court. A transcript for the purpose of an appeal was filed in the district court more than thirty days after judgment below. The only error assigned is the action of the district court in dismiss-

Henry & Coatsworth Co. v. McCurdy.

ing the appeal. According to repeated decisions of this court this action was right.

An affidavit appears in the transcript seeking to excuse the delay, but by still more numerous decisions it cannot be here considered because not preserved in a bill of exceptions..

AFFIRMED.

THE other commissioners concur.

36 863
36 860

**HENRY & COATSWORTH COMPANY, APPELLANT, V. D.
R. MCCURDY ET AL., APPELLEES.**

FILED MAY 2, 1893. No. 4696.

1. **Mechanics' Liens: PRIORITY: PROOF.** In a suit to foreclose a mechanic's lien, where other incumbrancers by answer deny the facts necessary to create the lien, it is necessary for the mechanic's lienor, in order to establish his lien as prior to such other incumbrances, to prove such facts, including the time of commencing labor or of furnishing material.
2. **Pleading: MORTGAGE FORECLOSURE.** An objection to the omission in a petition to foreclose a mortgage, of the averment that no proceedings have been had at law for the collection of the debt secured thereby, must be made prior to the rendition of a decree, as it relates to matter in abatement, and not to a fact affecting the validity of the mortgage.
3. ———. Whether a petition may at any time be attacked because of the omission of such averment, by another incumbrancer seeking to foreclose his lien in the same action, *quære*.

APPEAL from the district court of Lancaster county.
Heard below before CHAPMAN, J.

Samuel J. Tuttle, for appellant.

Leese & Stewart, H. F. Rose, and Atkinson & Doty, contra.

IRVINE, C.

The plaintiff commenced this action for the purpose of foreclosing a mechanic's lien which it claims upon lots 6 and 7, in block 101, of University Place, Lancaster county. The defendant, the Building & Loan Association of Dakota, filed its answer setting up a mortgage upon the same property, executed to it by the defendant Starr, to secure a loan from the association to Starr. The defendant, the Wesleyan University, filed an answer and cross-petition setting up a mortgage to it to secure unpaid purchase money upon the property, and praying a foreclosure. The defendant Starr seems to have filed an answer, but by leave of the court withdrew it before trial. The other defendants seem not to have appeared. The decree adjudges the mortgage of the building association to be a first lien upon the premises; that of the Wesleyan University a second lien, and establishes the lien claimed by plaintiff as a third lien. The plaintiff appeals, and the only questions presented relate to the priorities of these three incumbrances. A number of questions are presented in the arguments of the parties, but a consideration of two of them disposes of the case. The existence of the lien claimed by plaintiff was denied by the answers of both the Building & Loan Association and the university. The answer of the Building & Loan Association denies generally every allegation in the petition not in the answer expressly admitted, and makes no admission upon the subject except an argumentative admission that some lumber was furnished at some time for the erection of a building upon the lots described. The answer of the university in terms denies each averment of the petition in regard to the selling, furnishing and delivery of material by the plaintiff. The facts constituting a lien in favor of plaintiff were therefore put in issue by both these defendants, and it devolved upon the plaintiff to establish among other things that it furnished

the material described in its petition, or at least some portion thereof, for the erection of the house upon the premises described, and that it furnished such material, or began to furnish the same, at such a time as to entitle it to the priority claimed by it over the mortgages of the answering defendants.

Mr. Doolittle, the manager of plaintiff company, testified in direct examination that plaintiff furnished lumber to Starr & McCurdy for building houses upon the lots mentioned; that this was done during the season of 1889, "something previous to January 1. I do not remember the exact date, but I think in September, and about the commencement of the account." That this lumber was furnished according to the days and dates of the itemized account. On cross-examination he states:

A. I know the lumber was delivered there.

Q. Delivered where?

A. At the houses.

Q. At these three houses?

A. Yes, sir.

Q. How do you know that fact?

A. I know from our teamsters and delivery tickets, etc.

Q. Did you have no personal knowledge about it?

A. No, sir; no further than that.

Q. So, that so far as this material is concerned as to its getting into these houses, you have no knowledge on the subject?

A. No personal knowledge.

Again:

Q. I believe you testified in your cross-examination that you had no personal knowledge of any of this material being delivered to this property to be put into these houses?

A. I did not go with the material.

Q. You do not know whether it was taken there or not of your own knowledge?

A. No, sir; not of my own knowledge.

Henry & Coatsworth Co. v. McCurdy.

Q. Did you keep the books of the Henry & Coatsworth Company?

A. No, sir.

Q. Have you any personal knowledge as to whether this account, as to the items, and as to the time they purport to have been delivered—whether it is correct?

A. Nothing only as comes from my books.

Q. And you do not know whether they are kept correct or not? You did not keep them?

A. No, sir; I didn't keep them.

Q. Then, as a matter of fact, you don't know whether these items were furnished at the time the lien indicates or not?

A. Only what the books indicate.

Q. Only as you hear from others—you can't testify as to the correctness of the books?

A. No, sir; I have a book-keeper, and that is his business.

Q. Did you make out these accounts?

A. No, sir; they are made out by the book-keeper. That is supposed to be a copy of our book.

Q. Do you know whether it is a copy of your books or not—of your own knowledge?

A. I do not. I could not swear that it was.

At a later point in the trial certain books were produced by Doolittle, and, after some preliminary testimony, offered in evidence. They were excluded, and properly excluded, and no exception was taken.

There was also testimony from Mr. Doolittle showing the method of keeping the books and disclosing the fact that the plaintiff did have in its possession delivery tickets, which might, at least, have been used as memoranda to refresh the memory of the proper witnesses had they been called. Mr. Gascoigne was called and testified that it was his business to superintend all the loading and making out the dray tickets and to watch the men, and to make entries

in the books of original entries as to the lumber that goes out. His examination stops at that point and no facts relating to this transaction were sought to be elicited from him. The defendant Starr was called by the plaintiff, he being one of the persons who contracted for the lumber and built the houses. He testifies that the plaintiff rendered an account of the lumber, but that it was not correct; that it was figured too high, and there were mistakes in the items, amounting in all to three or four hundred dollars. He further testifies that he is not able to state when the lumber was delivered, or whether any of the items were correct, because lumber was being furnished for a number of houses, and the plaintiff was constantly delivering lumber to houses other than that for which it was ordered, requiring frequent interchanges of lumber delivered at one place to another. McCurdy corroborates Starr as to mistakes in the account.

The foregoing is the substance of all the testimony upon the subject. It will be seen that Mr. Doolittle's testimony was the purest hearsay and cannot be considered; and the only other testimony tends to discredit instead of to support the bill of items attached to the petition. There is an absolute and total failure of evidence to show that any particular item of material was ever furnished for this house, to say nothing of the time of delivery. The mortgages became liens upon the property upon the 6th of December, 1889, at the latest, and it was necessary for the plaintiff to prove that material was furnished before these liens were filed for record.

Another point suggested in the briefs perhaps requires notice. The cross-petition of the Wesleyan University contains no averment as to whether any proceedings had been had at law for the recovery of the debt. Such an averment is required by section 850 of the Code. No objection was raised to the cross-petition in the court below upon this ground, so far as the record discloses, and it cannot

Henry & Coatsworth Co. v. McCurdy.

for the first time be raised here. If there was a failure to allege a fact essential to this defendant's case, an exception to the rendition of judgment upon its cross-petition might present the question for review, but we do not regard this allegation so essential as to invalidate the judgment rendered upon a petition not containing it. In *Carlou v. Audman*, 28 Neb., 672, it was held that the omission of this allegation was not sufficient ground to authorize the district court to open up a judgment after the term at which it was rendered. This conclusion could hardly have been reached had the court considered the averment in question one necessary to the support of the judgment. The pendency of proceedings at law to recover the debt secured by mortgage is under our law in fact merely matter in abatement, which the Code requires to be negatived in the petition. It is not matter in bar, and does not affect the validity of the mortgage. It may indeed be questioned whether an incumbrancer seeking to establish and foreclose his incumbrance in the same action could at any time raise the question, the provision being for the benefit of the mortgagor.

The lien of plaintiff stood confessed by the failure of the owners of the property to answer the petition, and there was some evidence tending to show that they had admitted the amount claimed to be correct. While these admissions could not be received as against the mortgagees, and do not affect the question first discussed in this opinion, they were sufficient to ascertain the amount due as against the owners, and the lien was therefore properly allowed as one junior to the mortgages. The decree of the district court was right and is

AFFIRMED.

THE other commissioners concur.

Henry & Coatsworth Co. v. Starr. Jansen v. Williams.

HENRY & COATSWORTH COMPANY, APPELLANT, v. ED-
WARD I. STARR ET AL., APPELLEES,

AND

HENRY & COATSWORTH COMPANY, APPELLANT, v. ED-
WARD I. STARR ET AL., APPELLEES,

FILED MAY 2, 1893. Nos. 4697, 4698.

APPEALS from the district court of Lancaster county.
Heard below before CHAPMAN, J.

Samuel J. Tuttle, for appellant.

Leese & Stewart, H. F. Rose, and Atkinson & Doty, contra.

BY THE COMMISSION.

These two cases present precisely the same questions, and were submitted on the same bill of exceptions and briefs as the case of *Henry & Coatsworth Company v. McCurdy*, 36 Neb., 863, and are affirmed for the same reasons.

AFFIRMED.

ALBERT W. JANSEN ET AL. v. JOHN C. WILLIAMS.

FILED MAY 3, 1893. No. 4820.

1. Instructions should be given clearly, concisely, and without contradictory statements of the rules by which the jury should be governed. If, however, the instructions are not in compliance with this requirement, the verdict will not be set aside, if, upon the evidence, no other verdict could be sustained.
2. Principal and Agent: SALE OF LAND: PURCHASE BY AGENT.
An agent is required to disclose to his principal all the infor-

36b	899
43	787
36b	899
48	364
48	528
36b	899
55	582

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mation he has touching the subject-matter of the agency; and his relation to his principal forbids his becoming a purchaser thereof for his own benefit in any way without the full knowledge by the principal of this fact, and the principal's acquiescence therein with such knowledge. The burden of proving such knowledge and acquiescence is upon the agent.

3. ———: DUTIES OF AGENT: COMMISSION. A commission cannot be collected by the agent for his services as such if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

Jeffrey & Rich, for plaintiffs in error.

Adams & Scott, *contra*.

RYAN, C.

This action was brought by the defendant in error to recover the sum of \$100, retained as commission from the proceeds of the sale of real property, effected by the plaintiffs in error. The petition alleged the employment of plaintiffs in error to sell said real property for the sum of \$3,000, and that the plaintiff named in said petition meantime reserved for himself the right to sell said property, if he met with an opportunity to do so, before the same should be sold by plaintiffs in error; that soon after such employment the plaintiff below entered into negotiations with one E. T. Hartley for the sale of said property, and was about to sell said property to said Hartley for the sum of \$3,300; that during such negotiations with said Hartley, plaintiffs in error, for the purpose of preventing the defendant in error from making said sale, and wrongfully compelling the defendant in error to pay plaintiffs in error a commission of \$100, induced said Hartley to abandon his negotiations with defendant in error and agree to pay to them, the plaintiffs in error, \$3,000 for

said property; and that thereupon plaintiffs in error represented to defendant in error that they had sold said property for \$3,000 to a good responsible party, and induced the defendant in error to execute a deed to Albert W. Jansen, one of the plaintiffs in error, and defendant in error executed the same believing that said grantee was another than the said plaintiff in error, and thereby plaintiffs in error deceived and defrauded the defendant in error, to defendant in error's damage in the sum of \$100.

The answer admitted the placing of said property in the hands of plaintiffs in error for sale at \$3,000, but alleged that said E. T. Hartley was obtained by plaintiffs in error as an original purchaser, to whom they sold the property without any knowledge of any previous negotiations with defendant in error, and that the deed was taken to said Jansen only for the purpose of securing money advanced to said Hartley, and that the acts in connection with said transaction were in good faith. To this answer there was a reply in the nature of a general denial.

The testimony was conflicting as to some matters which are deemed of minor importance, but as to such as were essential to the determination of this case the difference was but slight. It was fairly deducible from the testimony that Williams employed Jansen and Murphy to sell the real property in question; that he afterwards had negotiations with said Hartley for an exchange of said property for property owned by Mr. Hartley, of the fair value of \$3,300; that Hartley, pending these negotiations, went to Messrs. Jansen and Murphy, and, learning from them that the property could be purchased from them for \$3,000, he dropped the negotiations with Williams; that for some reason the title to the property was taken from Williams and wife to A. W. Jansen, one of the plaintiffs in error, whose identity with his agent of that name Williams testifies he was unaware of when said deed was executed; that Williams inquired of Murphy who was the purchaser, and

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was informed by Murphy that the purchaser did not wish his name known in the matter, and therefore did not disclose it; that Jansen, in answer to the same inquiry of Williams, met it with the same refusal, at the same time saying that it made no difference, as the party was good. It was testified by Jansen and Murphy on the trial in the district court that the reason the title was taken in Jansen's name was, that Hartley was not able just then to advance the money to make the cash payment, and therefore this money was advanced by plaintiffs in error to insure the present consummation of the trade, rather than to wait ten or twelve days until Hartley would have money which would then be due him. Mr. Murphy fixed the date on which Mr. Williams consented to accept \$3,000 for the property at September 7, and testifies that, on account of defects in the field notes, suggested by plaintiffs in error, the deeds were not executed and delivered until about three weeks after that date. It is not shown by the testimony when Mr. Hartley obtained his money and paid it to plaintiffs in error. The fact that the settlement of the matter was held in abeyance until the expiration of a greater time than was necessary for Mr. Hartley to obtain his money, on his own estimate, to repay Jansen and Murphy, is possibly of no significance, and yet it might have been one circumstance contributing to the injury complained of. It would not be strange, or wholly illogical, if from the circumstance that the title was not really taken in the name of Jansen until after the time Hartley's money was due, the jury should have inferred that delays were interposed by plaintiffs in error to prevent the consummation of the trade until Hartley put up his own money with eight per cent per annum for the interim to repay Jansen his advancement.

Upon the admission or rejection of evidence no serious question for our determination was presented. The scope of the cross-examination to be allowed is largely in the discretion of the trial judge, and we cannot see that such

discretion was improperly exercised. As the only alleged error upon that score is sufficiently met by this general observation, it will not receive further attention.

There were some instructions given at the request of the plaintiffs in error which presented the law more favorably to the plaintiffs in error than the facts warranted, but of these the plaintiffs in error cannot complain. These instructions based the rights of the plaintiffs in error to a commission upon but a partial statement of the facts upon which such rights depended. For instance, the first paragraph of the instructions given at the request of the plaintiffs in error was as follows: "You are instructed that if you find from the evidence that defendants Jansen and Murphy negotiated the sale of the plaintiff's property to Hartley, or to Jansen for Hartley, upon the terms stipulated by Williams at the time he placed the property in their hands for sale without any knowledge of the previous negotiations between plaintiff and Hartley, then your verdict should be for the defendants." This instruction leaves out of consideration the fact that Jansen was the agent of Williams, who, as such, was bound to obtain for his principal the best price obtainable. It further recognizes the unqualified right of an agent to purchase property of a principal placed in his hands for sale. It gives the agent authority to deal with the property absolutely as he sees fit, provided he obtains the price fixed by the principal, and has no knowledge that the principal is in negotiations for a better price, and this to the extreme of buying the property himself, provided he buys for some one else, a very slight guaranty of protection to the principal. Most likely if plaintiffs in error had been successful in the district court these considerations would have necessitated a reversal of the judgment. In this connection it might not be amiss to suggest that the trial judge has a duty to perform, as well in the refusal of pernicious instructions as in giving correct ones. The jury is supposed to obtain

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its sole ideas of the law applicable to the case from the presiding judge. Upon him therefore devolves the duty of clearly and concisely instructing rather than hopelessly confusing. The statute requires the instructions to be in writing, that they may be prepared with due deliberation, and with the exactness necessary to assist jurymen unlearned in the law to apply principles perhaps for the first time brought to their attention. These instructions should therefore be clear and concise, and, above all things, should be exact, and free from contradictions. These remarks are made in this connection, for, with the instructions referred to above, there were given others entirely free from objection.

At the request of the defendant in error the court instructed the jury as follows: "An agent ought as far as possible to represent his principal, and to the best of his ability he should endeavor to successfully accomplish the object of his agency. It is also his duty to keep his principal fully and promptly informed of all the material facts or circumstances which come to his knowledge, and since he is expected to represent his principal, he cannot have a personal interest adverse to the interest of his principal, and if he deals with the subject-matter of the agency, the profits will, as a general rule, belong to the principal and not to the agent. In all things he is required to act in entire good faith towards his principal. There are duties which the law imposes upon an agent without any express stipulations on the subject, and one of these duties of an agent is to keep his principal informed of his acts, and to inform him within a reasonable time of sales made, and to give him a timely notice of all facts and circumstances which may render it necessary for him to take measures for his security. An agent cannot act for his principal and for himself in the same transaction by being both buyer and seller of property, and has no right to act as the agent for others for the purchase of property without the

knowledge or consent of such owner, nor to take any advantage of the confidence which his position inspires to obtain the title in himself. If you find that the defendants were the agents of the plaintiff for the sale of the property mentioned in the petition, and that in making the sale they purposely kept from the plaintiff any of the material facts touching said sale for the purpose of subserving their own interest, and intended to and did keep the plaintiff in the dark as to such facts until after the said sale was consummated and deed executed by said plaintiff, then I instruct you that they are not entitled to a commission for selling the same."

In *Stettinische v. Lamb*, 18 Neb., on page 627, is this language: "The rule is well settled that a party will not be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account." This statement was sustained by several authorities cited, and of its correctness there can be no doubt. In the light of adjudged cases and of the text-books, therefore, let us see what duty the plaintiffs in error had to perform towards the defendant in error in respect of the real property, which was the subject-matter of the agency between them. Upon this subject the following language is found in Pomeroy's *Equity Jurisprudence*, section 959: "In dealings without the intervention of his principal, if an agent, for the purpose of selling property for the principal, purchases it himself, or an agent, for the purpose of buying property for the principal, buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, or other similar features, are wholly immaterial; nothing will defeat the principal's right of remedy, except his own confirmation after full knowledge of all the facts."

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In *Porter v. Woodruff*, 36 N. J. Eq. Reports, on page 179, *et seq.*, the following language is found: "The general interests of justice and the safety of those who are compelled to repose confidence in others alike demand that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer and places himself in a position towards his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires and his duty to his principal demands. He is no longer the agent, but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide between his principal and himself what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and buyer, and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interest as more important and entitled to more protection than his own. In such cases the courts do not stop to inquire whether the agent has obtained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acts for himself, and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning

the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage, but they at once pronounce the transaction void, because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed, or an unjust advantage gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed or unfair advantage taken and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such a manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed and the prohibition against the agent acting in a dual character is made broad enough to cover all his transactions. The rights of the principal will not be changed nor the capacities of the agent enlarged by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price. No such distinction is recognized by the adjudications, nor can it be established without removing an important safeguard against fraud. (*Benson v. Heathorn*, 1 You. & Col. [Eng.], 326; *Conkey v. Bond*, 34 Barb., 276, 36 N. Y., 427.)

In *Ruckman v. Bergholz*, 37 N. J. L., 440, is found the following language: "The judge, distinguishing this case from one where the price was left open to the negotiations of the agent, instructed the jury that though the plaintiff was interested in the purchase when it was made, he might, nevertheless, recover his commissions as agent, notwithstanding the defendant was not aware of the existence of such interest. In this there was error, for it is a fundamental rule that an agent employed to sell cannot himself be a purchaser unless he is known to his principal to be such. (Dunlap's Paley on Agency, 33; Story, Agency, sec.

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210; and other cases cited.) And this rule is not inapplicable, nor is it relaxed when the employment is to sell at a fixed price, for it springs from the prohibitory policy of the law adopted to prevent the abuse of confidence and to remove temptation to duplicity. It requires a man to put off the character of agent when he assumes that of principal."

Mechem, Agency, sec. 455, states the rule as follows: "The agent will not be permitted to serve two masters without the intelligent consent of both. As is said by a learned judge, so careful is the law guarding against the abuse of fiduciary relations that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal or the like. All such transactions are void as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them he need not show himself damnified. Whether he has been or not is immaterial. Actual injury is not the principle the law proceeds upon in holding such transactions void. *Fidelity in the agent* is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he might be tempted by his own private interest to disregard that of his principal." (Citing *People v. Township Board of Overyssel*, 11 Mich., 222.) "This doctrine, to speak again in the beautiful language of another, has its foundation not so much in the commission of actual fraud as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation but deliver us from evil,' and that caused the announcement of the infallible truth that 'a man cannot serve two masters.'"

These quotations we shall properly close with the language of Story on Agency, sec. 210, quoted with the approval of this court in *Englehart v. Peoria Plow Co.*, 21 Neb., 48: "In this connection, also, it seems proper to

state another rule in regard to the duties of agents, which is of general application, and that is, that in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious considerations that the principal bargains in the employment for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent that he will act with a sole regard to the interests of his principal as far as he lawfully may; and even if impartiality could possibly be presumed on the part of the agent where his own interests are concerned, that is not what the principal bargains for, and in many cases it is the very last thing which would advance his interest. If then a seller were permitted, as an agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other, and thus a temptation, perhaps in many cases too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity."

It is unnecessary to quote further illustrations of the correctness of the instructions given the jury at the request of the defendant in error. The same principles announced in these instructions pervade all the text-works and the decisions of the courts which have to deal with the relations of principal and agent. In none of them is recognized the right of the suppression of important facts of which the principal had a right to be informed as a part of the "secrets of the real estate business," as was claimed by plaintiff in error Murphy in his testimony. The evidence fully sustains the verdict which was rendered by the jury.

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Indeed, a verdict different would probably of necessity have been set aside, as has been shown by abundant citation of text-writers and authorities. The instructions clearly gave the law to the jury as applicable to the evidence, and the judgment of the district court must therefore be

AFFIRMED.

THE other commissioners concur.

JULIUS FREIBERG ET AL. V. JULIUS TREITSCHKE ET AL.

FILED MAY 3, 1893. No. 4630.

Promissory Note: ACTION TO RECOVER: CONSIDERATION: COMPOSITION AGREEMENT: EVIDENCE: INSTRUCTIONS. The main issue in this case being whether the note sued upon was given by the defendant as payment for the other fifty per cent due from defendant to plaintiffs (fifty per cent having already been paid upon a general composition agreement of Treitschke with his creditors), or whether said note was given plaintiffs for services by plaintiffs' agent rendered for defendant, independently of such agency; it was proper to instruct the jury: 1. That if plaintiffs with Treitschke entered into such a composition agreement, a note taken for the fifty per cent by said composition rebated would be a fraud upon the rights of the other compounding creditors, and that payment thereof would not therefore be enforced. 2. Instructions as to the rights of plaintiffs, upon plaintiffs' theory of the transaction, properly required upon the evidence adduced that the jury should "believe from the testimony that such transaction was made in good faith, and not as a device to evade the effect of a payment to the plaintiffs directly."

ERROR from the district court of Douglas county. Tried below before DOANE, J.

Charles Ogden, for plaintiffs in error.

Howard B. Smith and Clinton N. Powell, contra.

RYAN, C.

On the 5th day of January, 1889, the plaintiffs in error filed in the district court of Douglas county a petition for the recovery of the amount, with interest and protest fees thereon, of the following promissory note:

"\$1,162.80. OMAHA, NEBRASKA, March 11, 1884.

Four months after date I promise to pay to the order of Mess. Freiberg & Workum eleven hundred sixty-two $\frac{80}{100}$ dollars, at the United States National Bank; value received.

JULIUS TREITSCHKE."

This note was indorsed in blank by August Doll.

The defendants admit the making and indorsement of the note, but claim that the same was given under an agreement for a settlement with the defendant Treitschke with all his creditors upon the basis of a certain percentage, which is hereafter detailed in the testimony; that under such agreement the plaintiffs had bound themselves ostensibly, to accept fifty per cent of the amount of their claim, and that the agent of the plaintiffs, with full authority to act in the premises, and for the purpose of securing the claim of the plaintiffs in full, agreed, without the knowledge of the other creditors of Treitschke, to procure a settlement and release from all of his creditors of their claims against him upon the basis of a certain percentage of their claims; but that in consideration thereof the plaintiffs should be paid in full of their claim; and that the plaintiffs were paid fifty per cent of their claim in cash, and that the note in suit was given for the remaining fifty per cent in pursuance of a secret agreement made between the agent of plaintiffs and the defendant Treitschke, and for no other consideration.

The plaintiffs denied that Mr. Brecher, the alleged agent, had any authority from them to enter into negotiations

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with the defendant Treitschke towards compromising their claim, except as contained in their written agreement to compromise, which was introduced in evidence, and is hereinafter referred to. They also denied that they knew of any arrangement being entered into between the said Brecher and the defendant Treitschke for the purpose of compounding with his creditors, except as shown by the agreement for compromise, and they averred that whatever Brecher did beyond that was without the knowledge, authority, or consent of plaintiffs. They also denied that they had ever received any amount of money from Treitschke upon their claim, and averred that no part of the one-half of their claim, provided for by the compromise agreement, had ever been paid to them.

The evidence was mainly directed to the terms of the arrangements entered into at the date of the above copied note. The testimony of Treitschke was, that Arnold Brecher, the agent of plaintiffs, sold him the goods from which arose his indebtedness to plaintiffs, to the amount of \$2,325.62; that afterwards, to-wit, in December, 1883, the witness became financially embarrassed, his creditors commencing attachment suits against him at that time; that among these attaching creditors were the plaintiffs; that in December, 1883, Arnold Brecher came to Omaha with reference to the attachment suit of plaintiffs against the witness then pending and had a conversation with the defendant Treitschke with reference to compounding with Treitschke's creditors; this conversation, Treitschke testifies, was to the effect that Brecher thought he could get all the creditors who had made attachments on the stock of goods to settle at fifty cents on the dollar, and that he could make settlement with those who had no attachments at twenty-five cents on the dollar. With reference to the claim of plaintiffs, as testified to by Treitschke, it was agreed that Treitschke should pay their claim in full if Brecher brought about settlements with the other creditors of Treitschke on

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the terms above talked of, and that this part of the agreement was made a secret, that no one was to know that plaintiffs got their full amount, while the other ones got but a half and a fourth. Brecher was advanced \$200 for the expenses of the trip which he was to make for the above purpose, and for his hotel bills, etc. The amount owing by Treitschke at that time was between nine and ten thousand dollars.

On the other hand, Arnold Brecher testified as to the above conversation, that Treitschke told him that it was a pity to see all these goods go; he would be ruined, and have nothing any more; that his wife would not consent that the creditors should get the money from these attachment suits; that he would fight them, and it would take a year or so to determine whether they would be entitled to the money or the attaching creditors should, and he asked witness whether something could not be done whereby he could make a settlement with the creditors. Witness Brecher testified that he answered that he thought something might be done; that he would think it over and let him (Treitschke) know in the afternoon. The conversation which accordingly took place that afternoon was detailed by Mr. Brecher in the following language (to witness Brecher):

Q. You went up there in the afternoon; what did you then say to Treitschke?

A. I told him (Treitschke) I thought I would be able to secure him a settlement with his creditors on the basis of fifty cents on the dollar with those which were secured by the attachments, and about forty with those that did not have security that were simply suing without an attachment; that I had to go and see these parties personally in order to get a settlement with them; for that purpose he employed me to do so.

Q. What did you tell him would be your compensation, if anything, for the work you were to do?

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A. I asked him to pay me one-half of the claim of Freiberg & Workum.

Q. What did you say in regard to your claim of Freiberg & Workum—in regard to the claim?

A. I told him at the time we had the conversation that he knew that I had guaranteed his account, and that I would be loser in that proportion. If he wanted me to get him a settlement I would undertake to get it, provided he paid me for my services fifty per cent of their claim, because they would agree to take fifty per cent of the other creditors.

Q. What did he say to that?

A. He accepted it very cheerfully.

Q. What else did he pay you?

A. He was to pay my traveling expenses, and he did pay me \$200.

The above was the only evidence which presented direct contradictions. There was no dispute that at the time there was prepared, in writing, a form of composition agreement to be entered into by the creditors of Treitschke, which agreement was afterwards signed by the greater part of his creditors, both in number and amount. This agreement, omitting the preamble, was as follows:

“In consideration of the premises, and for the purpose of saving litigation and expense, said Julius Treitschke proposes and hereby agrees to and with all his said creditors to pay his said creditors and compromise their attachments and claims, as follows, to-wit: to such creditors as are secured by attachment or otherwise, fifty cents for and upon the dollar of their respective claims; to such creditors as are unsecured, forty cents upon the dollar of their respective claims; said amounts to be paid in two installments, for which the said Treitschke is to give good bankable notes, to-wit, one-half in sixty days, and one-half in four months with approved security; provided, however, that upon the execution and delivery to each creditor ac-

ording thereto by said Treitschke of the notes hereinbefore referred to for the amount to be paid said creditor under this agreement, if said note shall be accepted as good and bankable, then said creditors shall in writing release and discharge said Treitschke from any and all attachments or claims of every nature, except said note. We, the undersigned creditors of said Julius Treitschke, hereby accept the above proposition and agree to settle and compromise our respective claims on the terms and in the manner herein set forth."

It does not clearly appear why the percentage was fixed at forty as to the creditors who had not attached instead of twenty-five per cent as testified to by Treitschke, but that figure was acquiesced in by him without demur, so far as the evidence shows. On March 11, 1884, the composition agreement having been secured by Brecher to the satisfaction of Treitschke, the note in suit was by Treitschke made, and by August Doll indorsed for an amount equal to one-half of the claim of plaintiffs against the defendant Treitschke; the other one-half was remitted by draft to plaintiffs. One of the plaintiffs testified that this note and remittance were forwarded by Brecher in discharge of his liability as guarantor, a liability to which Brecher referred in his testimony, as will be seen by the quotation above made.

Upon the issues made up, and in the light of the above evidence, for none other of special importance was given, the court instructed the jury as follows:

"That the issue for you to pass upon in this case is, did the plaintiffs agree with the defendant Treitschke and with his other creditors that they, the plaintiffs, would with the other creditors accept one-half of the amount of their claims in full, and would, upon the receipt of such proportion of their claims, release Treitschke from his obligation thereon, and at the same time have a secret agreement with Treitschke that they, the plaintiffs, should be repaid in

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full? If you find that such arrangements were made between the plaintiffs and Treitschke, that the plaintiffs received from Treitschke the one-half of their claim, and that the note in suit was given by the defendant for the other one-half at the time said compromise was made, then and in that case your verdict should be for the defendants, for the law will not permit a recovery to be had upon an obligation given under such circumstances.

"Second—If, however, you find from the testimony that the plaintiffs did not make, or authorize to be made, in their name or on their behalf any agreement by which they were to receive anything more than the proportion provided for by the compromise agreement, and that they have received nothing upon their claims but the note in suit, and that said note was given by the defendants and accepted by the plaintiffs in compliance with the agreement for compromise, then the plaintiffs are entitled to your verdict for the amount due on the note.

"Third—The plaintiffs are bound by the acts of their agent Brecher only so far as such acts were within the general scope of his authority as such agent, or were afterwards ratified and adopted by the plaintiffs. If, therefore, the plaintiffs, after hearing what had been done by Brecher in regard to the settlement of their claim against Treitschke, accepted the benefits of such settlement without objection; if you find that they did afterwards learn of the action of Brecher, and that with such knowledge they accepted the benefits of such action, they thereby adopted and ratified the action of Brecher, and are bound thereby, even though he, Brecher, was not authorized at the time by the plaintiffs to do all he did at the time the compromise agreement was made.

"Fourth—If you believe from the testimony that the defendant Treitschke agreed with Brecher to pay him, as his individual compensation for his services in procuring the signatures of Treitschke's creditors to the agreement,

an amount equal to one-half of the claim which plaintiffs held against him, such agreement would be valid and binding between Treitschke and Brecher, and if as a result of such agreement you shall find that Treitschke paid to Brecher the amount stipulated for, such payment cannot be charged against plaintiffs as a payment on their claim against Treitschke; provided you believe from the testimony that such transaction was made in good faith and not as a device to evade payment to the plaintiffs directly.

"Fifth—If, however, you find from the testimony that the purpose of such agreement between Treitschke and Brecher (if you find such agreement was made) was a device resorted to for the purpose of securing to plaintiffs payment in full of their claim and that the plaintiffs received whatever money was paid under such agreement and credited the same upon the claim against Treitschke, then you will be justified in finding that such payment was made by Treitschke to the plaintiffs in satisfaction of one-half of their claim against Treitschke, and in that case the plaintiffs would not be entitled to recover on the note in suit, and your verdict should be for the defendants."

The fourth instruction above quoted is criticised because of the following language with which it closes: "provided you believe from the testimony that such transaction was made in good faith and not as a device to evade the effect of a payment to the plaintiffs directly." In instruction five above quoted the statement of the effect of finding that the agreement between Treitschke and Brecher was a device resorted to for the purpose of securing plaintiffs, etc., is also strenuously objected to by plaintiffs in error for the reason, as alleged, that there was no proof to justify such language. The plaintiffs' contention in the district court was, that the note sued upon was taken by Brecher for services to be rendered by him for the benefit of Treitschke; that plaintiffs were unaware of this agreement; that this note was given directly to plaintiffs and not to Brecher;

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that by this note, with the draft forwarded plaintiffs by Brecher at the date of the note, the full amount of plaintiffs' claim against Treitschke was realized, and that this note was taken by Brecher and forwarded to plaintiffs in satisfaction of Brecher's guaranty of the debt of Treitschke to plaintiffs. Mr. Brecher himself testified that plaintiffs requested him to go to Omaha and watch their interest as against Treitschke after the attachment suits had been instituted against him for the collection of the same, and that he thereupon went to Omaha for the purpose indicated. It was while there as agent of the plaintiffs to look after this very claim that the agreement was made between Brecher and Treitschke as to securing a compromise between Treitschke and his creditors. According to Brecher's version of the matter he acted for the plaintiffs with reference to their claims as against Treitschke, settling for fifty per cent of plaintiffs' claim; at the same time he released plaintiffs' right to the other fifty per cent, which he took himself in consideration of his services in procuring his principals and other creditors to approve of the general rebate of fifty per cent.

In view of this unfortunate combination of circumstances neither Brecher nor his principals—the plaintiffs in this suit—have just cause to complain that the court's instructions to the jury contained the language above complained of, for upon the above circumstances and the other evidence in the case the jury could not be justly criticised if they found as a fact that plaintiffs' claim was paid in full, and that the attempt to account for established facts upon a different theory was a mere device; and without doubt such fact was clearly within the scope of the issues to be tried. There were other instructions given at the request of the defendants, of which complaint is made, but as the ground of criticism is covered by the foregoing considerations, such instructions and objections will not be considered in detail.

It will be necessary upon this branch of the case to say no more than that the law, as applicable to the issues made and evidence given, was correctly and very aptly stated to the jury in the instructions above quoted.

Plaintiffs, however, claim that the instruction which led the jury to discredit Mr. Brecher was erroneous and without foundation. It was as follows:

"Seventh—You are instructed that if you believe any witness has willfully sworn falsely to a fact, in respect of which he cannot be presumed liable to mistake, you may give no credit to any alleged fact depending upon his statement alone."

In view of what has already been said it can hardly be claimed that the court in this instruction had no reference to such facts as might fairly be deduced from the evidence; whether they were properly deducible was for the jury to say. It is barely possible that the criticism that the jury should have been told that the facts as to which the witness falsely testified must have been a material fact to justify the rejection of his evidence was a just criticism, if this was an original question. But it is not, for in *Dell v. Oppenheimer*, 9 Neb., 454, the syllabus states the rule thus: "Where a party swears falsely to a fact in respect of which he cannot be presumed likely to mistake, courts are bound to apply the maxim *falsus in uno, falsus in omnibus*, and to give no credit to any fact depending upon his testimony alone." The instruction complained of very closely follows this language; it embraces the same principle, leaving the rejection of the evidence optional rather than imperatively requiring it, as in the case cited. The rule stated in *Dell v. Oppenheimer*, *supra*, was referred to with approval in *Young v. Pritchett*, 10 Neb., on page 357. In *Atkins v. Gladwish*, 27 Neb., 847, the qualifying word, "material," was used, though the question considered did not arise upon the use of that word, but as to whether or not the words "unless corroborated" were indispensable. In *Walker v. Haggerty*,

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30 Neb., 120, the word "material" had been used, and the contention there was, whether there was any evidence which could be deemed material; not whether the word was indispensable. In the case at bar, the evidence of Brecher was, without question, material. Indeed, without it plaintiffs' theory as to Brecher's having earned the note sued upon would have been entirely without support. Under these circumstances we cannot say that the district court erred in giving the instruction omitting the word "material." This disposes of all the questions raised, and it results that the judgment of the district court is

AFFIRMED.

THE other commissioners concur.

36	890
40	879
36	890
44	171
36	890
50	909
54	674
36	890
58	680

**THOMAS SPELLMAN V. LINCOLN RAPID TRANSIT
COMPANY.**

FILED MAY 3, 1893. NO. 4997.

1. Street railway companies are common carriers of passengers, and are liable as other common carriers upon common law principles.
2. Common carriers, for the protection of their passengers, are bound to the exercise of more than ordinary care; they are bound to exercise extraordinary care and the utmost skill, diligence and human foresight, and are liable for the slightest negligence.
3. Street Railway Companies: INJURY TO PASSENGER: PRESUMPTION OF NEGLIGENCE: BURDEN OF PROOF. Where a street railway car is derailed and a passenger injured thereby, the presumption is that the casualty was due to the negligence of the carrier, and the burden is on it to rebut that presumption.
4. ———: ———: ———: ———. Where a passenger, without negligence on his part, is injured by the derailment of the car in

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which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented.

ERROR from the district court of Lancaster county.
Tried below before TIBBETS, J.

Charles A. Burke and Stearns & Strode, for plaintiff in error.

Webster, Rose & Fisherdick, contra.

RAGAN, C.

Thomas Spellman brought suit in the district court of Lancaster county, Nebraska, against the Lincoln Rapid Transit Company, alleging that it was a corporation owning and operating a street railroad in the city of Lincoln, and that on the 23d of May, 1890, while he, Spellman, was a passenger upon one of the transit company's cars, the defendant, its agents and servants, so negligently and carelessly used, managed, and controlled the said car and the engine by which it was drawn, and so negligently and carelessly managed, used, looked after, and repaired said road and the tracks and switches connected therewith, that the car in which the plaintiff was carried, and the engine drawing the same, were allowed to run off the track; that in consequence of the car running off the track plaintiff was thrown with great force and violence against the seat and the railing thereof in front of him, and then back on the seat and edges thereof behind him, and was thereby permanently injured, and that the plaintiff was careful and did not contribute to the injury in any degree whatever, and prayed for damages against the transit company.

The answer of the defendant denied all negligence of

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itself or servants; admitted that the car was derailed as claimed by the plaintiff; denied that the plaintiff's injuries were permanent, and alleged that the plaintiff was suffering from a rupture of old and long standing. To this there was a reply, consisting of a general denial, by the plaintiff.

There was a trial to a jury and a verdict for the transit company, and Spellman brings the case here on error.

On the trial it was admitted that the transit company was a corporation and engaged in the carrying of passengers for hire. There was no pleading or proof that Spellman was guilty of any contributory negligence whatever. The motive power of the cars was a dummy steam engine. The evidence in the record does not afford any precise explanation for the cause of the car's leaving the track.

The trial judge, at the request of the transit company, gave the jury the following instruction:

"While it is the duty of the defendant, as a carrier of passengers, to exercise proper care for their safety, yet the defendant is not an insurer of the safety of its passengers and not liable to them for injuries resulting from such defects in its means of transportation as could not have been guarded against by the exercise of care on its part, and which are not due in any way to negligence on its part.

"The test of negligence in such cases is whether the defects ought to have been observed practically and by the use of ordinary and reasonable care."

The giving of this instruction is here assigned for error. It will be observed that the test submitted by the learned judge to the jury was whether the transit company used ordinary and reasonable care. The defendant in error was a common carrier of passengers for hire, and the question to be determined in passing upon the correctness of this instruction is, what degree of care is due from a common carrier of passengers to its passengers?

In Rorer, Railroads, vol. 2, p. 1434, it is said: "For injuries occasioned by negligence, street railways are liable,

as others are, upon common law principles, and no more so." And on page 1436 the same authority says: "The company is bound to the highest degree of care and utmost diligence to prevent their (passengers) injury." To the same effect, see *Shearman & Redfield*, Negligence, sec. 226.

In *Smith v. St. Paul City Street R. Co.*, 32 Minn., 1, the court say: "Street railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence."

In *Sales v. Western Stage Coach Co.*, 4 Ia., 546, the rule is thus laid down: "Carriers of passengers for hire are bound to exercise the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants." (See also *Bonoe v. Dubuque Street R. Co.*, 5 N. W. Rep. [Ia.], 177.)

In *Derwort v. Loomer*, 21 Conn., 245, the supreme court of that state laid down the rule thus: "In the case of common carriers of passengers, the highest degree of care which a reasonable man would use is required by law."

This is also the doctrine of the supreme court of California. See *Wheaton v. North Beach & M. R. Co.*, 36 Cal., 590, where it is said: "Passenger carriers, by their contract, bind themselves to carry safely those whom they take into their coaches or cars, as far as human foresight will go; that is, for the utmost care and diligence of very cautious persons."

This is also the rule in New York. See *Maverick v. Eighth Ave. R. Co.*, 36 N. Y., 378, where it is said: "Passenger carriers bind themselves to carry safely those whom they take into their coaches, to the utmost care and diligence of very cautious persons." (See also *Carroll v. Staten Island R. Co.*, 58 N. Y., 126.)

This is also the doctrine of the supreme court of Colorado. (See *Denver, S. P. & P. R. Co. v. Woodward*, 4 Col., 1.)

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This is the doctrine of the supreme court of the United States. In *Philadelphia & R. R. Co. v. Derby*, 14 How. [U. S.], 485, it is said: "When carriers undertake to convey persons by the powerful, but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence." This doctrine is reaffirmed by the same court in *Steamboat New World v. King*, 16 How. [U. S.], 469. See these cases cited and approved in *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S., 291, where the court say, in reviewing the cases cited above: "We desire to reaffirm the doctrine, not only as resting on public policy, but on sound principles of law." They also cite *New York C. R. Co. v. Lockwood*, 17 Wall. [U. S.], 357, and quote and affirm that case as saying: "The highest degree of carefulness and diligence is expressly exacted." Continuing, the court say: "The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business; but it does emphatically require everything necessary to the security of the passenger, and reasonably consistent with the business of the carrier and the means of conveyance employed.

"The rule, as gathered from the foregoing authorities, requires that a common carrier of passengers shall exercise more than ordinary care; it requires the exercise of extraordinary care; the exercise of the utmost skill, diligence, and human foresight; and makes the carrier liable for the slightest negligence."

It follows from the foregoing that the giving of the instruction complained of was error.

Spellman also assigns as error the giving by the court below, at the request of the transit company, instructions Nos. 2 and 3. They are as follows:

"2. If the jury find from the evidence that the defendant constructed and laid its track in a proper manner, and had the same made safe and in good condition at the place of the accident complained of before it was put into use, and from time to time since, at reasonably short intervals, had the same inspected and repaired by competent track men, specially employed for that purpose, and that the car upon which the plaintiff was riding at the time of the accident was derailed without any fault or neglect of the person or persons in charge thereof for defendant, and the same is not shown to have been caused by any defect in said road or car, then the plaintiff could not recover for any injuries caused thereby, and the jury should find for the defendant.

"3. Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engines or cars, or negligence on the part of defendant's employes in operating the same, and could have been avoided by exercise of proper care in inspection and repair and operation, then the jury will find for the defendant. The mere fact that the defendant's car left the track and that plaintiff thereby sustained injury, is not sufficient to sustain a verdict for the plaintiff. To find a verdict for the plaintiff the jury must find that the defendant was in some way negligent in the care of its track or the running of its train, and the accident was caused by such negligence."

We shall consider these two instructions together. The court, in effect, told the jury by these instructions that, though Spellman might have been injured by the derailling of the car, that fact did not raise a presumption of negligence against the transit company; and further, it put the burden on Spellman of proving the particular cause of the derailment of the car.

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In Rorer, Railroads, vol. 2, p. 1434, it is said: "In actions against * * * (street railways) for personal injuries caused by the cars leaving the track, the burden of proof is on the company to show that there was no fault or want of care on its part." See the same doctrine in Patterson's Railway Company Accident Law, sec. 439.

The supreme court of the United States in *Stokes v. Saltonstall*, 38 U. S., 181, decided: "In an action against the owner of a stage coach used for carrying passengers for an injury sustained by one of the passengers by the upsetting of the coach, the owner is not liable, unless the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage. * * * The fact that the carriage was upset * * * is *prima facie* evidence that there was carelessness or negligence or want of skill upon the part of the driver, and casts upon the defendant the burden of proving that the injury was not occasioned by the driver's fault." This case was affirmed by the same court in *New Jersey R. Co. v. Pollard*, 22 Wall. [U. S.], 341.

In *Cleveland, C., C. & I. R. Co. v. Walrath*, 38 O. St., 461, the supreme court of Ohio thus announces the rule: "On proof of injury sustained by a passenger on a railroad train by the falling of a berth in a sleeping car, and that the passenger was without fault, a presumption arises, in the absence of other proof, that the railroad company is liable;" citing and affirming *Iron R. Co. v. Mowery*, 36 O. St., 418.

The supreme court of Colorado in *Denver, S. P. & P. R. Co. v. Woodward*, 4 Col., 1, adopted the rule in this language: "If a passenger is killed in consequence of the overturning of a car, a presumption arises that the casualty was the result of negligence, but such presumption may be rebutted."

The supreme court of Minnesota in *Smith v. St. Paul C. R. Co.*, 32 Minn., 1, formulates the rule as follows:

"Where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of the plaintiff's case."

In the course of the opinion the learned judge who delivered it said: "The severe rule which enjoins upon the carrier such extraordinary care and diligence is intended, for reasons of public policy, to secure the safe carriage of passengers, in so far as human skill and foresight can affect such result. From the application of this strict rule to carriers, it naturally follows that where an injury occurs to a passenger through a defect in the construction, or working, or management of the vehicle, or anything pertaining to the service, which the carrier ought to control, a presumption of negligence arises. The rule is therefore frequently stated, in general terms, that negligence on the part of the carrier may be presumed from the mere happening of the accident. The reason of the rule seems to be that from the very nature of things the means of proving the specific facts are more in the power of the carrier. The latter owning the property and controlling the agencies, is presumed to have peculiarly within his own knowledge the cause of the accident, which he might be interested to withhold, and might himself be unable to prove."

Such is the doctrine of the supreme court of Illinois as expressed by that court in *Peoria, P. & J. R. Co. v. Reynolds*, 88 Ill., 418, where it is said: "Where a railway car is thrown from the track whereby a passenger for hire is injured, the presumption is that the accident resulted either from the fact that the track was out of order, or the train badly managed, or both combined, and the burden is on

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the company to show it was not negligent in any respect." This is also the rule in Indiana. (See *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind., 462.) It is also the rule in New York. (See *Seybold, Administratrix v. New York, L. E. & W. R. Co.*, 95 N. Y., 562.)

In *Feital v. Middlesex R. Co.*, 109 Mass., 398, the action was against a street railway company for injuries resulting to plaintiff from an accident that happened while she was traveling in one of the defendant's cars. The plaintiff, to prove her case against the street car company, called the conductor and the driver of the car as witnesses, and they testified that the car ran off the track, one wheel inside and one outside of the track; that they with others left the car in question; that there was no defect in the car, the wheels, or the track; that the car was going about five miles an hour; that when they lifted the fore-wheels on the track, everything was right, and the car went on; that the cars went over this place just before and just afterwards without trouble and they did not know what made the car run off.

At the close of plaintiff's case defendant requested a ruling that the plaintiff could not recover, because she had failed to show negligence on the part of the street railway company. This motion was overruled. The railway company then introduced evidence that the road where the accident occurred had been gone over by their superintendent the day before the accident, and that there was no defect in it; that the day after the accident he saw the place where it occurred, and that there was nothing the matter with the road then and had not been since. The railway company then requested the court to instruct the jury as follows:

"The plaintiff received her accident from the fact of the car's running off the track while traveling at a moderate rate. There is no evidence that the car was out of order. It is not claimed that the driver did anything wrong, or

that the rails were before, or then, or afterwards out of order. * * * Under these circumstances the plaintiff cannot recover. That there was no evidence of any negligence on the part of the railway company. That the burden of proof is upon the plaintiff to show how the accident happened, and what was the particular negligence that caused the same; and that, unless the plaintiffs had done so they could not recover."

The trial court refused to so instruct, and this refusal was assigned as error. On appeal to the supreme court it said: "On the trial of an action against a street railway corporation for injuring a passenger, proof that the injury was caused by a car's running off the track at a place where the track and the car were under the exclusive control of the defendants is sufficient to charge them with negligence, in the absence of any evidence that the accident happened without their fault."

In the light of the foregoing authorities the court erred in giving the instructions complained of.

In our review of this case we have not been unmindful of the suggestion of the counsel for defendant in error that the trial court cured instruction No. 3 complained of by instructing the jury of his own motion: "A train of cars, similar to that operated by the defendant, is presumed to stay upon the track, and if such train should, for any reason, leave the track, the presumption is that it left the track through some fault of the defendant." It is not necessary to determine now whether this construction conflicted with the ones complained of, nor whether one cured the other. The greatest difficulty with the instruction complained of lies in this: "Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engine, or cars, or negligence on the part of the defendant's employes in operating the same, and could have been avoided by the exercise of proper care in inspection, repairing, and operation, then the jury will,

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find for the defendant." Here the jury were told in effect that the burden was on the plaintiff below to prove the cause of the derailment. This is not the rule. There is no claim by any one, nor is there a word of evidence, that Spellman was guilty of any negligence whatever. The transit company was a common carrier of passengers. Spellman was a passenger on its train. The car on which he was riding was derailed. He alleged he was injured thereby, and there was evidence to support the allegation. He alleged that the derailment of the car was through the carrier's negligence. The law by presumption supplied that proof for him. This was enough. The burden was then on the carrier to rebut this presumption of negligence by showing that it was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented.

The judgment of the district court is reversed, and the cause remanded with instructions to the court below to grant the plaintiff in error a new trial.

REVERSED AND REMANDED.

THE other commissioners concur.

36	900
139	778
139	778
36	900
41	310
36	900
59	472

C. R. BATES ET AL. V. DIAMOND CRYSTAL SALT COMPANY.

FILED MAY 3, 1893. No. 4737.

Breach of Contract: MEASURE OF DAMAGES. In a suit for violation of a contract the courts will not, for the measure of the damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed.

ERROR from the district court of Douglas county. Tried below before HOPEWELL, J.

Fawcett, Churchill & Sturdevant, for plaintiffs in error.

Leavitt Burnham and Kennedy & Learned, contra.

RAGAN, C.

The Diamond Crystal Salt Company sued Bates, Wilcox & Streeter. The petition alleged that the salt company sold and delivered to Bates, Wilcox & Streeter, at their request, 375 cases of Diamond Crystal salt at an agreed price of eighty-five cents per case, amounting to \$318.75, and that the defendants were entitled to a credit of \$45 commission earned by them on the sale of salt, and prayed judgment for \$273.75, with seven per cent interest from the 30th day of August, 1887, the day of the sale and delivery of the salt.

Bates, Wilcox & Streeter answered this petition, admitting the purchase and price of the salt, but alleged that the sale of the salt sued for was made by one Canan, the agent of the salt company, who, as an inducement for the defendants to purchase said salt, then and there gave them, Bates, Wilcox & Streeter, the exclusive agency for the sale of the plaintiff's salt in the state of Iowa and in all the states and territories in the United States west of the Missouri river, and then and there agreed to allow the defendants a commission of \$45 per car load on all of said salt sold by them, Bates, Wilcox & Streeter, within said territory; that said agency should continue as long as the defendants, Bates, Wilcox & Streeter, faithfully represented the plaintiff and endeavored to sell its salt.

The defendants also alleged that the said Canan assured them that their commissions on the sale of salt would pay for the car load purchased long before the same would be due and payable; and that they, Bates, Wilcox & Streeter, relying upon the assurances and promises of the

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said agent, bought the car load of salt sued for, accepted the agency, and at once commenced a canvass for the sale of salt and spent twenty-three days' time, paying their own expenses, and that they made sale of three car loads of salt, one to Witner Bros., one to Shenkberg & Co., and one to Warfield, Howell & Co., and had arrangements almost completed for the sale of seven other car loads of salt; that the salt company failed and refused to fill the orders for salt sold to Shenkberg & Co. and Warfield, Howell & Co., and without any notice to the defendants refused longer to recognize them as agents; and that by reason of the salt company's failure to deliver the car load of salt sold by plaintiffs in error to Warfield, Howell & Co., that firm lost confidence in plaintiffs in error and countermanded an order which they had given them for a car load of starch, on which the plaintiffs in error would have realized a profit of \$60.

The plaintiffs in error counter-claimed, under said contract, as follows:

Commission on sale of car load of salt to Witner Bros.....	\$45 00
Commission on sale of car load of salt to Shenkberg & Co.....	45 00
Commission on sale of car load of salt to Warfield, Howell & Co.....	45 00
To time and expenses in soliciting orders for salt for plaintiff, for twenty-three days at \$10 per day	230 00
To loss of profit on car of starch sold to Warfield, Howell & Co., said sale having been countermanded on account of failure of plaintiff to ship salt as agreed.....	60 00
	<hr/>
	\$425 00

and prayed that the \$318.75 due to the salt company from them for the car load of salt purchased and sued for might be deducted from the counter-claim of \$425, and that they, Bates, Wilcox & Streeter, have judgment for the difference.

To this answer there was a reply filed, consisting of a general denial.

It appears from the briefs on file that this action was originally brought in the county court, and then taken by appeal to the district court, where, on the issues stated above, trial was had, the jury finding a verdict for the defendant in error for the sum of \$183.75 and \$34.29 interest, or a total of \$218.05.

Bates, Wilcox & Streeter bring the case here on error.

There is no error in this case of which the plaintiffs in error should complain. If there is any error, it is to the prejudice of the defendant in error.

The jury by its verdict allowed the plaintiffs in error a commission for the sale of three car loads of salt at \$45 per car. This was all the salt that they had sold, and under the contract they pleaded they were only to have commissions on the amount of salt actually sold by them.

There was no error in the court's refusing to permit the plaintiffs in error to put in testimony to prove their counterclaim for hotel bills, traveling expenses, time spent in canvassing, and profits on the car load of starch. If the contract which they plead was made as they claim, they were not entitled under that to anything but commissions on sales actually made; they were not entitled to commission and time and traveling expenses too.

To measure the plaintiffs in error's damage by the rules contended for by them would be to give a plaintiff who sued for a breach of contract a greater compensation than he would have received had the contract been performed.

We do not assent to the contention of the plaintiffs in error that the consideration for the purchase by them of the car load of salt sued for was that they were to be appointed the agents of the salt company. In fact, the plaintiffs in error did not so plead it. It is very likely that Canan's representations to plaintiffs in error in regard to the agency was one of the motives that influenced them to purchase,

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but we do not think the evidence shows that that was the consideration.

Complaint is made because the court gave instructions Nos. 6, 7, and 8.

Instruction No. 6 told the jury that, under the evidence, Canan had no authority to appoint the plaintiffs in error agents for the sale of the salt company's salt in the state of Iowa. There was no error in giving this instruction; it was conceded by plaintiffs in error that Canan had no such authority.

The seventh instruction told the jury that the salt company's shipping a car load of salt sold by plaintiffs in error to Witner Bros. was a ratification of that sale by the salt company, and that they were liable for the commissions on that sale. The instruction also left it to the jury to say whether, from all the testimony, the salt company, by any word or act, had recognized the defendants as their agents in the sale of the other two car loads of salt, and if they found it had, the plaintiffs in error should be allowed commissions for them. There was nothing in this instruction to the prejudice of the plaintiffs in error.

The eighth instruction complained of told the jury that their verdict must, in any event, be for the salt company for something, as none of the set-offs pleaded by the plaintiffs in error could be considered, except those in regard to the commissions on the sales of salt. There was no error in this instruction.

Plaintiffs in error also complain that there was error in the court's allowing the salt company to recover its costs. In order for the plaintiffs in error to have that reviewed here they must file in the court below a motion to retax the costs, and bring the ruling of the court on that motion up.

The judgment of the district court is in all things

AFFIRMED.

THE other commissioners concur.

J. FRANK BARR ET AL. V. OBADIAH S. WARD.

FILED MAY 3, 1893. No. 4884.

1. **Action on Bond: TRIAL: ADMISSIBILITY OF EVIDENCE.** Plaintiffs in error, as sureties, signed a bond to a manufacturing company that one W. would pay for all goods to be furnished him by the manufacturing company; one Ward brought suit on this bond against the sureties, alleging that on the date thereof the manufacturing company sold a bill of goods to W.; that he had not paid for the same, and that the manufacturing company had assigned the account to Ward. To sustain this allegation at the trial he offered in evidence a note made by W. to the manufacturing company of the same date as the bond, with evidence that the note was given "for goods delivered, or to be delivered," by the manufacturing company to W. *Held*, Irrelevant under the pleadings.
2. ———: ———: ———: **PLEADING: SURETIES: REVIEW.** The petition against the sureties also contained a second cause of action, claiming damages for expenses Ward had been put to in prosecuting his claim against W. to judgment. *Held*, Not to state a cause of action against the sureties. On the trial plaintiff was permitted to read in evidence to the jury protest of the note, showing protest charges, and a transcript of a judgment rendered on said note in favor of Ward, showing constable and justice of the peace costs. *Held*, Error.

ERROR from the district court of Lancaster county.
Tried below before FIELD, J.

W. Henry Smith, for plaintiffs in error.

Abbott, Selleck & Lane, contra.

RAGAN C.

Obadiah S. Ward sued J. Frank Barr and F. L. Everts and E. J. Witte in the district court of Lancaster county. The substance of his petition was as follows: That on the 7th day of February, 1889, the defendant Witte, as principal, and Barr and Everts, as sureties, executed and

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delivered a bond to the Western Manufacturing & Novelty Company in the penal sum of one thousand dollars, conditioned that the said Witte should pay for all goods bought by him of said novelty company. A copy of the bond is set out in the petition, the important clauses of which are as follows :

"Whereas, The Western Manufacturing & Novelty Company * * * has entered into a contract with E. J. Witte to furnish and sell him from time to time goods, wares, and merchandise on credit: * * *

"Now, therefore, the said E. J. Witte, as principal, and J. Frank Barr and F. L. Everts, as sureties, are held and firmly bound unto the said Western Manufacturing & Novelty Company in the penal sum of one thousand dollars, * * * that the said E. J. Witte will well and faithfully pay for said goods, wares, and merchandise so to be furnished and sold to him under said contract, and that he will do so within the time agreed upon between himself and said company."

The petition also contained a copy of the contract mentioned in the bond, but it is not quoted, as it is not material here. The petition further alleged that, in pursuance of the contract, the novelty company did, on the 7th day of February, 1889, sell to E. J. Witte a bill of goods amounting in value to the sum of \$188.50; that afterwards, to-wit, on or about the — day of February, 1889, the Western Manufacturing & Novelty Company assigned the account for said goods to the plaintiff; that Witte had not paid said sum, or any part thereof; that the plaintiff had prosecuted a suit to judgment against Witte, and execution had been returned, "No property found."

For a second cause of action the plaintiff alleged that his necessary costs and expenses incurred in the prosecution of said claim against the said Witte amounted to the sum of \$65, with the usual prayer for judgment against the defendants.

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The answer was in effect a general denial.

There was a trial to a jury, verdict and judgment for the plaintiff, and the sureties, Barr and Everts, on whom alone there was service, bring the case here for review.

In order for the plaintiff to recover on his first cause of action it was necessary for him to prove by competent testimony that the Western Manufacturing & Novelty Company had, since the execution of said bond, sold to Witte a bill of goods; that the right of action of the Western Manufacturing & Novelty Company therefor had been assigned to the plaintiff, and that the goods were unpaid for. There is no proof in this record that the Western Manufacturing & Novelty Company sold a bill of goods to Witte after the execution of the bond and assigned the account therefor to the plaintiff.

As to the second alleged cause of action in the petition, it does not state a cause of action against the plaintiffs in error, and no evidence whatever of any character was competent to be introduced under the said second alleged cause of action.

On the trial the plaintiff offered in evidence a note bearing date February 7, 1889, for \$188.50, payable to the order of the Western Manufacturing & Novelty Company, and signed by E. J. Witte. This note bore an indorsement without date as follows: "The Western Manufacturing & Novelty Company, G. B. Cameron, Sec'y." To the introduction in evidence of this note the defendants objected on the ground of its being incompetent testimony. The court overruled the objection and permitted the note to be read in evidence to the jury. This was error. If the note was offered for the purpose, as it seems to have been, of showing that Witte bought goods of the Western Manufacturing & Novelty Company after the date of the bond, and gave this note therefor, then it was incompetent under the pleadings. It did not meet the allegation of the petition, as that does not declare on a note at all, but on an as-

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signed account for goods sold and delivered. If it was claimed that Witte had bought goods of the Western Manufacturing & Novelty Company after the execution of the bond; that he had given this note for those goods, and the note had been sold to the plaintiff, the petition should have so alleged, and until the pleadings were amended the note could not go in evidence. The counsel for plaintiff, so far as this record discloses, made no application to the court for leave to amend his petition.

It was incompetent for another reason. Assuming it to be an account against Witte for goods sold and delivered to him by the Western Manufacturing & Novelty Company, and there is some testimony which tends to show that it was given for goods; there is no evidence in the record to show when the goods were sold to Witte, if at all, and there is no evidence whatever that the indorsement on the back of this note was made by G. B. Cameron, the secretary of the company, to say nothing about the lack of proof as to Cameron's authority to sell the company's notes.

There is still another error in admitting this note in evidence. The note was offered, together with the protest of the same, and they all went in together. I do not know under what theory the plaintiff could have offered in evidence this protest, except it was to sustain his allegation of damages in his second cause of action; and as we have already seen, no evidence could be adduced under that cause of action. The contract of the sureties on Witte's bond was not to pay costs and expenses incurred by anybody in suing Witte for goods sold to him by the Western Manufacturing & Novelty Company, nor was their contract to pay protest fees on notes given by Witte to that company. Their contract was to pay for the goods that he bought, and being sureties, they are entitled to have this contract construed with the greatest strictness, and it can be extended in no particular to make them liable beyond the very letter of their contract.

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On the trial the plaintiff also put in evidence, over the objection of the defendants, a transcript of the proceedings before a justice of the peace in a suit brought by the plaintiff against Witte and a large number of others on the note above referred to. This was error. First, it was incompetent under the pleadings, as this suit is not a suit upon a judgment, and there is no foundation laid for the introduction of any such transcript. It was probably introduced in evidence to support the damages alleged by the plaintiff in his second cause of action.

The court below, notwithstanding the pleadings, tried this case upon the theory that the note above mentioned was given by Witte to the Western Manufacturing & Novelty Company after the execution of the bond sued on for goods purchased by Witte, and that the note stood for an account, and the indorsee of the note stood in the place of the assignee of the account. Aside from the fact that this theory was wholly incompetent under the allegations of the plaintiff's petition, there is absolutely no proof in this record as to when, if ever, the Western Manufacturing & Novelty Company sold any goods to Witte. There was some testimony which tended to show that the note was given for goods delivered, or to be delivered, by the novelty company to Witte.

The plaintiff in his direct testimony testified that he had a talk with Barr, one of the defendant sureties, "and Mr. Barr admitted that it (the note) was given for goods delivered, or to be delivered." This testimony was not competent as against the other surety, Everts, and counsel for defendants should have objected to it on that ground. It was probably competent to go to the jury for whatever it was worth as against Barr; and even this admission is denied by Barr. And the so-called admission and its denial constitute all the evidence on the subject as to the consideration for the note. The plaintiff was also asked:

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Q. Did you ever, at any time, have a conversation with Witte regarding the payment of this note?

A. Yes, sir.

Q. State what was said, if anything, in regard to the signature on the note.

This was objected to by defendants' counsel on the ground that Witte was not a competent witness. The objection was overruled, and the witness answered :

A. Mr. Witte said he gave this note for the purpose of getting goods.

This answer was not responsive to the question and could have been struck out, and probably would have been if counsel for the defendants had asked it.

The court then asked this question of the plaintiff:

Q. That is, the note was for the purpose (of getting goods)?

A. Well, yes.

This testimony was clearly incompetent and its admission was highly prejudicial to the defendants, but strange enough there was no objection made by their counsel to the question of the court.

As the case has to be tried again, it may be well to observe that the admissions or declarations of Witte, the principal, are not competent evidence against the sureties.

For the foregoing reasons the judgment of the district court is reversed and the cause remanded to the court below with instructions to grant the plaintiffs in error a new trial.

REVERSED AND REMANDED.

THE other commissioners concur.

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 3. The record entry of a judgment rendered in the county court as embodied in a duly authenticated transcript imports absolute verity, and cannot be varied or contradicted by extrinsic evidence in the appellate court. *Sullivan v. Benedict* 409
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1. Where the officers of an insolvent bank, by willful false representations as to the amount of paid up stock of the bank, induce persons to deposit money therein, they will be personally liable therefor. *Porter v. Sherman County Banking Co.*..... 279
2. A national bank received certain real estate mortgages and notes for collection, the proceeds to be sent to the owner when collected. The bank made the collections, but failed before all remittances were made. *Held*, That the bank was the agent of the owner of the securities, and that the money derived therefrom was a trust fund which did not become a part of the assets of the bank. The receiver had no right to such fund. *Griffin v. Chase*..... 328
3. In an action to wind up the affairs of an insolvent bank it appeared that a claimant held certain certificates of deposit which he received as the purchase price of securities delivered to the president of the bank. The certificates were never entered as a liability of the bank on its books. The president testified that he did not represent the bank in the transaction; that the purchase was his individual venture; and that the certificates were accepted as his personal obligation. This was denied by the claimant, who testified that his agreement was with the bank alone. The bank books showed that a portion of the certificates was paid by the bank as they matured and the amount thereof charged to the president's account. *Held*, That the certificates are *prima facie* indebtedness of the bank, and the receiver having failed to establish the contrary, a finding of a referee in favor of the validity of the claim will be sustained. *State v. Farmers & Drovers Bank*..... 675

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7. Certificate of the trial judge attached to the bill in this case as follows: "February 28, 1890. All evidence. True bill. Ordered part of record in this case," although informal, is sufficient. *First National Bank of Denver v. Lowrey*..... 290
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9. The cause was tried in the district court on the 17th day of December, 1889, and forty days given to reduce the exceptions to writing. The term of court adjourned without day December 23, and on the 29th day of the following month the trial judge, on a showing of diligence, granted an extension of thirty days' additional time in which to complete and serve a bill of exceptions. A draft of the bill was served on the attorneys of the successful party on February 19, 1890. *Held*, That the same was

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 2. The petition referred to above contained a second cause of action, claiming damages for plaintiff's expenses in prosecuting his claim to judgment. *Held*, Not to state a cause of action against the sureties. On the trial plaintiff was permitted to read in evidence to the jury protest of the note, showing protest charges, and a transcript of a judgment rendered on said bond in his favor, showing costs. *Held*, Error. *Id.*
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2. When a train has made a reasonable stop and passengers have not given notice or other evidence of their intention to alight, the starting of the train is not *per se* negligence for which the company will be held liable. *Chicago, B. & Q. R. Co. v. Landauer* 643
3. Common carriers, for the protection of their passengers, are bound to the exercise of more than ordinary care; they are bound to exercise extraordinary care and the utmost skill, diligence and human foresight, and are liable for the slightest negligence. *Spellman v. Lincoln Rapid Transit Co.* 890
4. The term criminal negligence, as used in sec. 3, art. 1, ch. 72, Comp. Stats., means gross negligence, such as amounts to reckless disregard of one's own safety and a willful indifference to the consequences liable to follow. *Chicago, B. & Q. R. Co. v. Landauer* 643
5. It is not such contributory negligence for a passenger to jump from a moving train as will in every case prevent a recovery under the statute above cited; but where the circumstances are such as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, such act amounts to criminal negligence as above defined. *Id.*
6. It is the duty of railroad companies to stop their trains

at stations a sufficient length of time for passengers to get on and off, and it is negligence for the conductor or other servant of the company to start a train while passengers are obviously in the act of getting on or alighting therefrom. *Id.*..... 642

7. Are liable for damages to live stock in addition to the penalty under sec. 4386, Rev. Stats. U. S., if the animals are kept in cars more than twenty-eight consecutive hours, unless prevented from unloading by storm or other accidental causes, or unless the animals have proper food, water, space, and opportunity to rest on the cars, but to state a cause of action the petition must show that the case is not within the exceptions named. In case discussed in opinion it was *held* that neither the allegations nor proof justified a verdict for general damages. *Hale v. Missouri P. R. Co.*..... 266

8. In an action to recover damages for injury to stock occasioned by the negligence of a railroad company in shipping the same, it was *held* that the company was not liable because a conductor failed to fulfill a promise to awaken the plaintiff at a station where it was proposed to stop and feed, and the stock was carried by. *Id.*..... 270

9. In an action to recover for personal injuries sustained by the plaintiff in jumping from a moving train, the facts stated in the syllabus, *held*, not to sustain the charge that the defendant company negligently started the train without giving plaintiff sufficient or reasonable time to alight. *Held, further*, That plaintiff was guilty of such contributory negligence as will prevent a recovery for the injuries received in jumping from the train. *Chicago, B. & Q. R. Co. v. Landauer*..... 648

10. Where a passenger, without negligence on his part, is injured by the derailment of the car in which he is traveling, the carrier, to overcome the presumption of negligence caused by such derailment, must show that the accident was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented. *Spellman v. Lincoln Rapid Transit Co.*..... 890

Certificate of Acknowledgment. See ACKNOWLEDGMENT.
DEEDS, 2, 3.

Certificate of Appointment. See COUNTIES, 5.

Certificates of Deposit. See **BANKS AND BANKING**, 3. **INTEREST.**

Challenge. See **JURY**, 3.

Character. See **CRIMINAL LAW**, 3.

Chattel Mortgages. See **ATTACHMENT**, 4. **FRAUDULENT CONVEYANCES**, 2, 5, 6, 8. **INSURANCE**, 4. **JUDGMENTS**, 6. **SALES**, 3. **VOLUNTARY ASSIGNMENTS**, 2.

1. In the action of an attachment creditor against the debtor the validity of chattel mortgages made by the debtor to other parties cannot, as against such mortgagees, be adjudicated. *McCord v. Krause*..... 764
2. Debtor in failing circumstances may prefer one or more creditors by execution of mortgage or conveyance absolute, if done in good faith and not to defraud other creditors. *Costello v. Chamberlain*..... 45
3. Instrument in form of mortgage or bill of sale will not be held to be an assignment for benefit of creditors unless it creates a trust in favor of some person other than mortgagor or vendor. *Id.*
4. A mortgage upon a stock of merchandise, under that general description, attaches only to such merchandise as was in the stock when the mortgage was executed, and not to any afterwards purchased. *Rockford Watch Co. v. Mansfield*..... 802
5. The first paragraph of the syllabus in *Henry v. Vliet*, 33 Neb., 130: "A pre-existing debt is a valuable consideration for a chattel mortgage and protects the mortgagee to the same extent as had he paid a new consideration," is overruled. *Henry v. Vliet*..... 138
6. Unsecured creditors of a mortgagor of chattels are entitled to have the mortgages foreclosed as required by law, and a sale otherwise than as the law provides, although in accordance with an agreement of the mortgagor and mortgagees, is no protection to those participating in the proceeds of the sale. They are liable to account to such creditors for the value of the goods, less the valid liens thereon. *Rockford Watch Co. v. Mansfield*..... 802
7. A junior mortgagee of chattels, who agrees with the senior mortgagee and the mortgagor that the goods mortgaged may be sold and the proceeds applied to the payment of the mortgages in the order of their priority as disclosed by the records, cannot, after such sale and appropriation of the proceeds, maintain an action to avoid the senior mortgage for fraud in its inception without proof

that the facts constituting the fraud were discovered after the agreement and sale. *Id.*..... 801

8. A mortgage upon growing corn is not constructive notice to a dealer in grain who, in good faith, in open market purchases such corn from the mortgagor after the same has been husked by the latter and placed in a pile or crib. But the rule does not prevail when the person who assisted in husking the corn afterwards becomes the purchaser, while it is yet in the same pile or crib, and receives it there, having at the time actual knowledge that it is the same corn he helped harvest. In such case the purchaser will take the corn subject to the lien of the mortgage. *Fines v. Bolin*..... 621

Checks. See NEGOTIABLE INSTRUMENTS, 9, 11, 12.

Cities. See MUNICIPAL CORPORATIONS.

Cities of Second Class. See SCHOOLS AND SCHOOL DISTRICTS.

City Council. See MUNICIPAL CORPORATIONS, 3.

Claims. See BANKS AND BANKING, 3. COUNTIES, 3. CREDITOR'S BILL. HOLIDAYS. VOLUNTARY ASSIGNMENTS, 3, 5.

Clergymen. See RELIGIOUS SOCIETIES.

Collateral Attack. See BILL OF EXCEPTIONS, 4. COUNTY BOARD. GUARDIAN AND WARD, 2.

Collections. See BANKS AND BANKING, 2. NEGOTIABLE INSTRUMENTS, 16.

Commencement of Action. See ACTIONS.

Commission. See PRINCIPAL AND AGENT, 1. REAL ESTATE BROKERS.

Common Carriers. See CARRIERS.

Commutation Tickets. See STREET RAILWAYS, 3.

Competency. See CRIMINAL LAW, 7. WITNESSES, 3, 4.

Competition. See TAX SALES.

Composition in Insolvency. See NEGOTIABLE INSTRUMENTS, 17.

Compromise.

- A borrower conveyed certain real estate by absolute deed to secure a loan. The grantee afterwards recognized the trust character of the deed and promised to pay the grantor the excess of the debt upon a sale of the land. An action

to redeem was brought by the grantor who offered to pay the loan and interest. Before trial the parties entered into a stipulation as to the amount plaintiff should pay defendant, whereupon plaintiff was to recover the premises. *Held*, That in the absence of fraud or misrepresentation the agreement was binding and would be enforced.

Hawley v. Doe..... 398

Condemnation Proceedings. See EMINENT DOMAIN, 1, 3, 4.

Confessions. See CRIMINAL LAW, 5.

Conflict of Laws.

In a real estate mortgage foreclosure on property in this state it appeared that a resident of Nebraska executed the note and mortgage and agreed in the note to pay an attorney's fee for collection in case of foreclosure. The payee was a resident of Iowa. The papers were executed and delivered and the money paid to the borrower in this state. The note was payable in New York. The provision for payment of attorney's fee is binding in Iowa. It was stipulated in the note and mortgage that those instruments were made and executed in, and are to be construed by, the laws of Iowa. *Held*, That the law of the place of the forum governs the application of the remedy, such as the recovery of costs, and that the said provision in the note for attorney's fee, being contrary to the settled law of this state, will not be enforced. *Security Company of Hartford v. Eyer*.....

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Confusion of Goods. See SALES, 5.

Where wheat has been delivered to a mill and wrongfully converted into flour and stored with other flour belonging to the mill owner, the owner of the wheat will be entitled to such portion of the flour as the wheat would probably produce. *First National Bank of Denver v. Scott*.....

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Congress. See CONSTITUTIONAL LAW.

Consideration. See CHATTEL MORTGAGES, 5. MORTGAGES, 6. NEGOTIABLE INSTRUMENTS, 12, 17. SALES, 3.

Constables. See SHERIFFS AND CONSTABLES.

A constable is not entitled to fees for serving a writ placed in his hands, where he fails to return upon the process the particular items of costs. *Van Etten v. Selden*.....

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Constitutional Law.

By the apportionment act of February 7, 1891, Nebraska is entitled to six representatives in congress after the 3d

day of March, 1893. In an action to compel the governor to call an election for three additional members of congress to fill a vacancy caused by the want of representation in the present congress, *held*, that the question was a political and not a judicial one; that by reason of improved methods the census was more rapidly taken and the returns classified than formerly, so that the population of each state was known a few months after the enumeration was made, and that to deprive those states entitled to increased representation for two years was unjust, but congress should provide the remedy. *State v. Boyd*..... 181

Constructive Notice. See FRAUDULENT CONVEYANCES, 10, 11. REGISTRATION. VENDOR AND VENDEE, 2-4.

Contest of Will. See WILLS.

Continuance. See REVIEW 11.

1. Permitting counter-affidavits to be used on a motion for continuance is improper. *Barton v. McKay* 633
2. An affidavit based upon the absence of a witness, which fails to show that either the personal attendance of the witness or his evidence would probably be obtained, if the trial should be postponed or cause continued, is insufficient. *Id*..... 635
3. Where a justice of the peace continued a case for more than ninety days on application of defendant with consent of plaintiff and subsequently overruled defendant's objection to jurisdiction, it was *held* that the adjournment did not operate as a discontinuance of the action under sec. 961 of the Code, and that defendant could not claim a dismissal by reason of the postponement of the trial at his own instance. *Fischer v. Cooley*..... 626

Contractors.

Who furnish the labor and services of others are not entitled to the benefit of the statute which excepts execution for wages from exemption. *Henderson v. Nott*..... 154.

Contracts. See CONFLICT OF LAWS. CORPORATIONS, 1, 9. INFANTS. INSURANCE, 1. MARRIAGE. REPLEVIN, 12. SALES, 1, 4. SPECIFIC PERFORMANCE, 2, 3, 4. STATUTE OF FRAUDS. VENDOR AND VENDEE, 1. USURY, 1-3. WAGES.

1. A written contract embodied in a receipt cannot be contradicted by parol testimony. *Morse v. Rice*..... 212
2. In a suit for breach of contract, the instruction referred to in the opinion on the question of ratification, *held*, to be without error. *Bates v. Diamond Crystal Salt Co*..... 904

3. In an action by an employe for a wrongful discharge he must allege and prove that he is willing and ready to complete his contract. *Hale v. Sheehan*..... 439
4. A contract to accept drafts thereafter to be drawn upon certain conditions, can be made the basis of a recovery by the payee of such drafts, only upon showing full and exact compliance with each of said conditions. *Palmer v. Rice*..... 844
5. In a suit for violation of a contract the courts will not, for the measure of damages, apply a rule which would give plaintiff a greater compensation for a breach of the contract than he could receive had it been performed. *Bates v. Diamond Crystal Salt Co.*..... 900
6. The contract set out at length in opinion construed, and held, that the promise to pay off and discharge incumbrances on real estate covered by plaintiff's mortgage was not absolute, but conditional. *Security Company of Hartford v. Eyer*..... 507
7. A person who contracts in writing to accept and pay such drafts as shall be drawn by a party named, in favor of another party also named, upon compliance with certain conditions, is absolutely liable upon drafts drawn as contemplated, irrespective of the condition of the general account between the drawer and drawee at the time such drafts are made. *Palmer v. Rice*..... 844

Contributory Negligence. See CARRIERS, 5, 9, 10. NEGLIGENCE.

Conversion. See CHATTEL MORTGAGES, 6, 7. TROVER AND CONVERSION.

Conveyances. See CHATTEL MORTGAGES. DEEDS. FRAUDULENT CONVEYANCES. MORTGAGES. SALES. VENDOR AND VENDEE.

Corporations.

1. Contracts of a corporation which are not contrary to the express provisions of its charter are presumed to be within its powers, and the burden is upon one denying their validity to prove the facts which render them *ultra vires*. *Gorder v. Plattsburgh Canning Co.*..... 548
2. Evidence discussed in opinion in a foreclosure proceeding held to sustain the findings of the district court that the indebtedness secured by the mortgage of the defendant corporation was not in excess of the limitation named in its charter. *Id.*

3. In order to recover from stockholders of a corporation on account of a failure to give the statutory notice of its indebtedness, it must affirmatively appear that the credit was given to such corporation while it was in default of the required notice. *Id.*..... 549
4. The stockholders are not liable under the provisions of secs. 136, 139, ch. 11, Gen. Stats., for a debt which was not incurred while the officers of the bank were in default in publishing notice of the condition of the bank. *Porter v. Sherman County Banking Co.*..... 271
5. Where there was a substantial compliance with the law requiring the articles of incorporation to be filed and published, mere defects, even if they existed, did not render the articles void, and it was held that the company was a *de facto* corporation. *Id.*..... 275
6. Where a deed or mortgage purporting to have been executed by a corporation is signed and acknowledged in its behalf by the president and secretary thereof, with the corporate seal attached, the presumption is that it was executed by authority of such corporation and the burden of proof is upon one who denies such authority. *Gorder v. Plattsburgh Canning Co.*..... 548
7. In a foreclosure proceeding the evidence referred to in opinion examined and held to sustain the finding that the indebtedness of the defendant company to the plaintiffs, directors thereof, was contracted with the knowledge and approval of the intervenors who were stockholders, and that the execution of certain mortgages to secure such indebtedness was sanctioned by such stockholders. *Id.*... 549
8. Two persons were conducting a private bank, and organized a corporation with an alleged capital of \$50,000, of which they retained a controlling interest. They turned over the deposits and assets of the private bank to the new corporation, and notes were taken from a number of the stockholders for the amount of their stock. Held, That the stockholders were liable for the unpaid stock held by each, and for a sum equal to the shares so held by each for all liabilities of the bank accruing while he was a stockholder. *Porter v. Sherman County Banking Co.*..... 272
9. The relation of the directors to stockholders of a corporation is of a fiduciary character and their contracts and dealings with respect to the corporate property will be carefully scrutinized by the courts. Such contracts are not, however, necessarily void. Where it is clear that the transaction is in good faith on the part of the director and

- beneficial to the corporation which has with the sanction of the stockholders received and appropriated the consideration without offering to make restitution, it may be upheld when assailed even in a court of equity. *Gorder v. Plattsmouth Canning Co.*..... 548
- Costs.** See CONFLICT OF LAWS. JUSTICE OF THE PEACE, 1. REPLEVIN, 8.
- Where a party, against whom there is an order to pay costs, desires to review the same on error in the supreme court he must file a motion to retax and bring up the ruling thereon. *Bates v. Diamond Crystal Salt Co.*..... 904
- Co-Tenants.** See REPLEVIN, 10.
- Council.** See MUNICIPAL CORPORATIONS, 5.
- Counter-Affidavits.**
- Should not be permitted on motion for continuance. *Barton v. McKay* 633
- Counties.** See COUNTY CLERKS. COUNTY SEAT. OFFICE AND OFFICERS, 3.
1. Where a county has once made payment of the salary of a county officer to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterwards be compelled to pay the same salary to the *de jure* officer. *State v. Milne*..... 301
 2. Where a county board negligently fails to keep a public bridge in suitable repair so as to be in a safe condition for travel, and damages have been occasioned by reason thereof, under the act of the legislature of 1889, the county is liable therefor to the person sustaining the damages, unless he has been guilty of contributory negligence. *Hellingsworth v. Saunders County* 141
 3. The person sustaining such damages may maintain an original action against the county whose duty it was to keep the bridge in repair. He is not required to present his claim to the county board for allowance or rejection, since the provisions of sec. 37, ch. 18, Comp. Stats., do not apply to demands arising upon torts. *Id.*..... 142
 4. A county board is not authorized to declare vacant a county office and make an appointment to fill such vacancy on the sole ground that an officer elect is ineligible and therefore unable to qualify. The incumbent of such office has a right to qualify within ten days after it is ascertained that his successor elect is ineligible, and upon qualifying in the manner provided by law will be entitled to

- hold over until a successor is elected and qualified. *Richards v. McMullin*..... 352
5. Dodge county is under township system of government. The territory comprising the city of Fremont constitutes a township in said county by said name, and is entitled to, and has been represented in the county board by, two supervisors chosen by the electors of said city. A vacancy having occurred in the office of one of the supervisors of said city, the relator was appointed by the mayor and city council of said city to fill such vacancy, who took the oath of office, executed a bond in due form with sufficient sureties and tendered the same within the time fixed by law to the respondent as county judge for approval. *Held*, That the certificate of appointment of the relator was *prima facie* evidence of his right to the office, and that it was the duty of the respondent to approve said bond and the sureties thereon. *State v. Plambeck* 401
- County Board.** See COUNTIES. COUNTY CLERKS. COUNTY SEAT.
- Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally, except for fraud. *Ragoss v. Cuming County* ... 376
- County Boundaries.** See ELECTIONS, 8.
- County Clerks.** See COUNTY SEAT, 3.
- Under sec. 42, ch. 28, Comp. Stats., where the fees of the county clerk exceed \$1,500, the county board may appoint such number of deputies as may be necessary and fix their salary at not to exceed \$700, the same to be paid out of the fees received by the clerk. In an action on the clerk's official bond to recover fees collected by him, where the county board has appointed a deputy and fixed his salary and the deputy has actually rendered the services, those facts may be proved even if there is no record of the order in the minutes of the county board. *Ragoss v. Cuming County*..... 376
- County Commissioners.** See SCHOOLS AND SCHOOL DISTRICTS.
- County Courts.** See APPEAL, 4. JUDGMENTS, 7. PRACTICE, 3. VOLUNTARY ASSIGNMENTS, 3, 4.
1. A judgment rendered in a county court in the absence of the defendant may be set aside under section 1001 of the Code, although the amount claimed exceeds \$200. *McCormick Harvesting Machine Co. v. Schneider* 206

2. A county court has jurisdiction of an action brought upon a party wall agreement to recover one-half the expense of building the wall, where the amount sought to be recovered does not exceed the jurisdictional limit of such court. *Garmire v. Willy* 340

County Judges. See COUNTIES, 5.

County Officers. See COUNTIES, 4.

County Organization. See ELECTIONS, 8, 9.

County Seat.

1. The petition for an election for the relocation of a county seat must show the section, township, and range on which, or the town or city in which a petitioner resides, together with his age and time of residence in the county. *Cress v. Coffman* 894
2. To entitle a county board to call an election for the removal of a county seat a petition must be presented to it by resident electors of the county equal in number to three-fifths of all the votes cast in the county at the last general election. *Id.*
3. Persons interested in the removal of a county seat are entitled to examine the original petition in the office of the county clerk before the election is called and should have a reasonable time for that purpose. It is not sufficient to furnish a certified copy as such parties have the right to see the purported signatures of the petitioners. *Id.*, 895
4. Where objections are made, by any resident elector on oath, to the petition for calling an election to remove a county seat, charging that a certain number of the petitioners are minors, certain other number are not electors, certain names are fictitious, a certain number have been bribed, the aggregate of which will reduce the number of petitioners below three-fifths of the votes cast at the preceding general election, it is the duty of the board to set a reasonable time for hearing said objections to enable parties to offer proof in support of their charges. *Id.*

County Supervisors. See COUNTIES.

County Treasurers. See COUNTIES, 1. PARTIES, 4. TAX SALES.

Courts. See COUNTY BOARD. COUNTY COURTS. COUNTY SEAT, 4. EVIDENCE, 16. JUSTICE OF THE PEACE. RECEIVERS. RELIGIOUS SOCIETIES. SUPREME COURT.

Creditor's Bill. See FRAUDULENT CONVEYANCES, 9-12. STATUTE OF LIMITATIONS, 6, 7.

A person was worth \$5,000 in 1882, and at that time erected

a house and made improvements which cost \$2,000 on the lands of his mother. He continued to assist her until 1886, when he died insolvent. *Held*, That the mother's estate would not be subjected to the payment of the residue of a debt of the son contracted since 1882, where the creditor received payment of her share of the assets of decedent's estate *pro rata* with other creditors, and the proof failed to show that decedent was insolvent when he assisted his mother, or that his assistance caused his insolvency. *Johnson v. Johnson*..... 700

Criminal Law. See EVIDENCE, 12. FALSE PRETENSES.
HABEAS CORPUS. INDICTMENT AND INFORMATION.
JUSTICE OF THE PEACE, 2. NEW TRIAL, 2, 5. RAPE.
WITNESSES, 1.

1. A defect in the verification of an information is waived by pleading to the information. *Bailey v. State*..... 808
2. The rulings of the district court in a criminal case cannot be reviewed by the supreme court prior to the rendition of a final judgment in the prosecution. *Gartner v. State*..... 280
3. Where a person on trial for a crime has not himself put his general character in issue, the state cannot do so on the pretext of impeaching a witness by disproving the statements of the witness. *Carter v. State*..... 481
4. An order of the district court overruling a plea in abatement to an indictment is not a final order within the meaning of the statute, and a petition in error cannot be prosecuted therefrom previous to the prisoner's conviction. *Gartner v. State*..... 280
5. Confession or admission of accused is not alone sufficient to convict; but commission of crime being established by other evidence, confession may be proved to connect accused with offense. *Ashford v. State*..... 38
6. Intoxication is no justification or excuse for crime; but evidence of excessive intoxication, by which the party is wholly deprived of reason, if the intoxication was not indulged in to commit crime, may be submitted to the jury for it to consider whether in fact a crime has been committed, or to determine the degree, where the offense consists of several degrees. *O'Grady v. State*..... 320
7. In a criminal prosecution, evidence which on its face is clearly incompetent and prejudicial to the accused should not be introduced, and if the prosecution, without a promise to prove other facts to render it competent, is permitted

to introduce such evidence and it is thus placed before the jury, an order of the court to strike it out does not wholly cure the wrong, and may be cause for reversing the judgment. *Bedford v. State*..... 702

Criminal Negligence. See CARRIERS, 4, 5.

Crops. See CHATTEL MORTGAGES, 8. REPLEVIN, 10.

Cross-Examination. See WITNESSES, 2.

Crossings. See RAILROAD COMPANIES, 5-7.

Cross-Petition. See PLEADING, 13.

Damages. See CARRIERS, 7, 8. COUNTIES, 2. EMINENT DOMAIN, 3, 4. MASTER AND SERVANT, 5. SALES, 1.

1. In a suit for breach of contract the courts will not, for the measure of damages, apply a rule which would give plaintiff a greater compensation than he could receive had the contract been performed. *Bates v. Diamond Crystal Salt Co.*..... 900

2. The measure of damages for injury to plaintiff's property caused by the building of a viaduct in front of his lot is the difference between the value of the property immediately before and after the construction of the same, and disregarding public benefit. *City of Omaha v. Hansen*, 125

Days of Grace. See NEGOTIABLE INSTRUMENTS, 3.

Death. See EVIDENCE, 13.

Decedents. See CREDITOR'S BILL. WITNESSES, 3, 4.

Declarations. See EVIDENCE, 14.

Decrees. See DEEDS, 3. JUDGMENTS. REVIEW, 23.

Deeds. See ACKNOWLEDGMENT. CORPORATIONS, 6. EVIDENCE, 13. FRAUDULENT CONVEYANCES, 9-12. MORTGAGES, 3. QUIETING TITLE. VENDOR AND VENDEE, 3, 4.

1. Sufficiency of proofs to show delivery. *Stuart v. Hervey*.... 1

2. A deed in other respects sufficient and regular is effective, as between the grantor and grantee therein, to pass complete title even though executed in a foreign state it is there acknowledged before only a purported justice of the peace as to whose genuine signature, official character and power, there is no accompanying certificate of a proper officer having a seal. *Connell v. Gallagher*..... 749

3. A decree obtained for the purpose of obviating the objection that the acknowledgment of a deed was not shown to have been proved by the certificate of a duly authorized

officer is operative only against parties to the action and others in privity with such parties. Whatever rights are held by a stranger to such a suit are unaffected by such a decree. *Id.*

Deeds as Mortgages. See COMPROMISE.

De Facto Corporations. See CORPORATIONS, 5.

De Facto Officers. See COUNTIES, 1. OFFICE AND OFFICERS, 2.

Default. See JUDGMENTS, 9. MORTGAGES, 8. PLEADING, 13. PRACTICE, 3.

Defect of Parties. See PARTIES.

Defective Appliances. See MASTER AND SERVANT, 2, 3.

Deficiency Judgment. See MORTGAGES, 7.

Definitions. See WORDS AND PHRASES.

Degree of Skill. See PHYSICIANS AND SURGEONS, 2.

Delinquent Taxes. See TAX SALES.

Demand. See NEGOTIABLE INSTRUMENTS, 10, 11. REPLEVIN, 9, 12.

Demurrer. See PLEADING, 4, 9. REVIEW, 29.

Description of Real Estate. See POWER OF ATTORNEY.

Directors. See CORPORATIONS, 7, 9.

Disbursement. See LEGISLATIVE APPROPRIATIONS.

Discipline. See RELIGIOUS SOCIETIES.

Discovery of Fraud. See FRAUDULENT CONVEYANCES, 10-12.

Discretion of Trial Court. See EVIDENCE, 14. REVIEW, 32. WITNESSES, 2.

Dishonor. See NEGOTIABLE INSTRUMENTS, 11, 16.

Dismissal. See APPEAL, 1. CONTINUANCE, 3. RES ADJUDICATA, 2, 3.

Where testimony has been introduced justifying the granting of any relief, and in support of any issue, the court cannot dismiss the action because of a failure of proof upon other issues. *Westover v. Lewis*..... 692

Distribution. See MORTGAGES, 1, 2.

Drafts. See CONTRACTS, 4, 7.

Drunkenness. See CRIMINAL LAW, 6.

Ecclesiastical Proceedings. See RELIGIOUS SOCIETIES.

Ejectment.

The evidence in case stated in opinion held not sufficient to show title in defendant by adverse possession. *Sprague v. Fuller*..... 220

Elections. See COUNTY SEAT.

1. Canvassing board has no authority to go behind the returns and inquire into legality of votes. *State v. Van Camp*, 91
2. A certificate of election issued upon a canvass of a part of the vote of a representative district is without authority of law and void. *Id.*
3. Provisions of the election law which are not essential to a fair election will be held to be formal and directory only unless declared to be mandatory by the law itself. *Id.*
4. The vote for a candidate should not be rejected for the reason that his name was written on the sample and official ballots by the clerk after they had been printed and were ready for distribution. *Id.*
5. Votes for representative will not be rejected because the number of the representative district is not designated upon the official ballot in counties included in one district only. *Id.*
6. At the general election held in 1883 the proposition for the annexation to Hall county of the territory organized as Boyd county failed to receive one-half the total vote cast, and was held to have been defeated. *Id.*
7. Neither a canvassing board nor a court in a *mandamus* proceeding will inquire into the regularity of the nomination of candidates, nor the sufficiency of their certificates of nomination. *Id.*
8. Holt county boundaries are clearly defined, do not include any part of the territory organized as Boyd county, and there is no *de facto* attachment of the latter territory to Holt county for election purposes. *Id.*
9. Within the meaning of sec. 146, ch. 18, Comp. Stats., the territory comprising Boyd county was while unorganized territory attached to Knox county for election purposes, and hence included within the twentieth representative district. *Id.*
10. Canvassing officers may be required by *mandamus* to issue certificate of election to the person appearing from the returns to have been elected member of the legislature, but such certificate will not conclude the legislature in contest proceedings. *Id.*

11. The constitution and laws contemplate that every qualified elector shall be entitled to vote at each election for state and county officers; and a construction will not be adopted that will disfranchise a considerable number of voters and deprive a county of representation, unless rendered necessary by express and unequivocal language. *Id.*

Elective Franchise. See ELECTIONS, 11.

Eminent Domain. See HIGHWAYS. MUNICIPAL CORPORATIONS, 2.

1. The word "non-resident," in sec. 100, ch. 16, Comp. St., relating to condemnation proceedings for right of way for a railroad, means a non-resident of the state and not of the land affected, or of the county where it is situate. *Pacific E. Co. v. Perkins* 456
2. Evidence referred to in opinion in trial of a condemnation proceeding, *held*, to prove a mere expression of opinion of parties named in the record, and not an offer of compromise, and is therefore admissible under the issues. *Omaha S. E. Co. v. Beeson* 366
3. On trial of a condemnation proceeding proof of annoyance by smoke and ashes from passing trains is admissible where the railroad track is constructed near the dwelling of the property owner, not as an independent element of damage, but as evidence tending to prove the value of the property after the construction of the track. *Id.*..... 361
4. On trial of a condemnation proceeding it was not error to admit evidence tending to prove that the property in question was susceptible of subdivision into smaller lots, by reason of which it was more valuable, and that in consequence of the construction of the railroad track subdivision thereof was rendered impossible, whereby the value of the tract was greatly impaired. *Id.*

Emoluments. See OFFICE AND OFFICERS, 2, 3.

Employment. See MASTER AND SERVANT.

Enactment of Laws. See STATUTES, 1.

Equity. See CORPORATIONS, 9. CREDITOR'S BILL. INJUNCTION, 1. PARTNERSHIP. QUIETING TITLE. REVIEW, 23, 24. SPECIFIC PERFORMANCE, 3. VENDOR AND VENDEE, 2.

A plaintiff filed a petition to remove a cloud from his title caused by an outstanding contract for the sale of the land and also to remove a cloud caused by a mortgage, which it was alleged was barred by the statute of limitations.

Held, That to entitle him to affirmative relief he must do equity by paying the amount due on the mortgage; but as the court had dismissed his petition for want of equity, he would not be required to pay the amount due on the barred mortgage. *Merriam v. Goodlett*..... 384

Error. See APPEAL. ASSIGNMENTS OF ERROR. MALICIOUS PROSECUTION. REVIEW.

Error Proceedings. See CRIMINAL LAW, 2. REVIEW.

1. Where parties to a proceeding in error submit the controversy upon its merits, they will be held to have waived the objection that there is a defect of parties. *Curtis v. Atkinson* 111
2. A motion for new trial and ruling thereon are necessary to obtain a review of the proceedings of the district court on error in the supreme court. *Jones v. Hayes*..... 526

Error Without Prejudice. See PLEADING, 14.

Estimates. See SCHOOLS AND SCHOOL DISTRICTS.

Estoppel. See CONTINUANCE, 3. HOMESTEADS, 2.

Evidence. See ADULTERY. BANKS AND BANKING, 3. BASTARDY. BONDS. CREDITOR'S BILL. CRIMINAL LAW, 5, 7. EMINENT DOMAIN, 3, 4. EXECUTORS AND ADMINISTRATORS. FALSE PRETENSES. FRAUDULENT CONVEYANCES, 3, 8. MALICIOUS PROSECUTION. MARRIAGE. MASTER AND SERVANT, 3. NEGOTIABLE INSTRUMENTS, 7, 14. NEW TRIAL, 2, 5. PHYSICIANS AND SURGEONS, 3, 4. QUIETING TITLE. RAILROAD COMPANIES, 2, 4. RAPE, 3-5. REVIEW, 17, 30, 39, 42. TROVER AND CONVERSION, 1. USURY, 5. WAGES. WILLS. WITNESSES, 3, 4.

1. In charge of rape proof of deformity of prosecutrix is proper, as tending to show diminished power of resistance. *Richards v. State*..... 17
2. Evidence in an action on a promissory note, discussed in opinion, held not to sustain the defense of alteration of the instrument. *Reuber v. Crawford*..... 334
3. The evidence referred to in opinion is sufficient to sustain a verdict for defendant in an action upon a written guaranty. *Wyeth Hardware & Manufacturing Co. v. Shearer*.... 5
4. Where on a trial an inspection of the premises in question is proper, but impracticable or impossible, a photographic view thereof is admissible. *Omaha S. E. Co v. Beeson*..... 361
5. Of insanity from intoxication may be submitted to the

- jury for it to consider whether a crime has been committed or to determine the degree of the crime. *O'Grady v. State*..... 320
6. *Ex parte* affidavit referred to in the opinion held inadmissible under the rules of evidence, and that it was properly excluded from the jury. *Barton v. McKay*..... 638
7. A written receipt may be explained or contradicted by parol testimony; but when it embodies a contract it cannot be contradicted, but is conclusive upon the parties in the absence of fraud or mistake. *Morse v. Rice*..... 212
8. Referred to in opinion in trial of a condemnation proceeding held to prove a mere expression of opinion of parties named in record, and not an offer of compromise, and is therefore admissible under the issues. *Omaha S. R. Co. v. Beeson*..... 366
9. In a charge of rape where complaint is not made till seven months, when, by reason of pregnancy, concealment is no longer possible, the statements of the prosecutrix are not admissible; but *aliter* as to independent facts, such as the condition of her clothing. *Richards v. State*..... 17
10. Referred to in opinion was held sufficient to establish the fact that a servant who sued a firm for wages, was employed by, and rendered services for, his father, a member of the firm, and that the other member was not liable. *Glade v. White* 172
11. In an action on a county clerk's official bond to recover fees collected by him while in office he may prove that the county board appointed a deputy and fixed his salary, and that the deputy actually rendered the services, even if there is no record of such order in the minutes of the county board. *Ragoss v. Cuming County*..... 376
12. Letters written by third parties in another state to third parties in this, but not in answer to letters written by the accused nor connected therewith, are not admissible in evidence against the accused in a criminal prosecution to prove a material fact in the case. *Bedford v. State*..... 702
13. A recital in a deed of recent date that the grantors are the heirs at law of a former owner of the lands therein described, is not sufficient evidence, as against a stranger to the instrument, of the death of the supposed ancestor, or that the 'persons who executed the deed are his heirs. *McMurtry v. Keifner*..... 522
14. Declarations of a party to a suit, explanatory of his physical condition at the time the declarations are made, are

- admissible where the circumstances warrant the inference that they were made spontaneously and not with a view to their effect upon the controversy. Whether or not they fall within this rule must be left largely to the discretion of the trial court. *Hewitt v. Eisenbart*..... 794
15. In an action to redeem land where the debtor gave an absolute deed as security it was *held* proper, in the absence of fraud, to admit in evidence a stipulation of the parties as to amount due defendant whereupon the plaintiff was to recover the land, the agreement having been made while the suit was pending. *Hamley v. Doe*..... 398
16. Where the plaintiff in a civil action to recover the penalty for taking usurious interest makes a written demand for an inspection of a book in possession of defendant containing certain specified entries relating to the merits of the suit, and the demand is not complied with in four days the court, or a judge in vacation, may, on motion and notice, make an order for inspection, or permission to take a copy of the book entries, and on failure of defendant to comply with the order the court may exclude the entries from being given in evidence, or if wanted as evidence by the plaintiff, may direct the jury to presume them to be such as the plaintiff by affidavit alleges them to be. *First National Bank of Dorchester v. Smith*..... 198
- Examination.** See WITNESSES, 2.
- Exceptions.** See BILL OF EXCEPTIONS. INSTRUCTIONS, 9. REVIEW, 27.
- Excuse for Crime.** See CRIMINAL LAW, 6.
- Executions.** See EXEMPTIONS.
- Where an officer levies an execution on personal property as the property of the debtor, and the property is replevied by another claimant who, on the trial of the replevin suit fails to maintain title, and returns the property to the officer after an adverse judgment, the lien of the levy is not divested; and on such facts an officer levying a subsequent execution on the same property, and applying the proceeds of sale thereon, is liable to the first execution creditor. *Bowman v. First National Bank of Nelson*..... 117
- Executors and Administrators.** See PLEADING, 14. WITNESSES, 3, 4.
1. An action was brought against a sheriff and was twice reversed in the supreme court. Before the third trial the plaintiff died, and the cause was revived in the name of his executrix, who states in her petition that she sues as

- such. *Held*, Sufficient to show that she brought the action in her representative capacity. *Williams v. Eikenbary*..... 478
2. On the trial of the case the plaintiff sought to disprove the allegations of her petition by showing that her duties as executrix had ceased, and she had been discharged. *Held*, That she should have pleaded the facts by supplemental petition, and not having done so the testimony was properly excluded. *Id.*..... 479
- Exemptions.** See HOMESTADS, 2.
1. A person who contracts to furnish all help and make and burn brick for a certain price per thousand, and also agrees to keep the machinery furnished by the other party in good repair, to supply oil for the same, and feed and care for the team furnished by the other party, is not entitled to the benefit of sec. 531 of the Code, which excepts execution for wages from exemption. *Henderson v. Nott*..... 154
2. Persons who contract for and furnish the labor and services of others, whether with or without their own services, for a stipulated price for the joint labor of all, are not entitled to the benefit of the statute. *Id.*
- Expert Testimony.** See REVIEW 39, 41.
- Expert Witnesses.** See PHYSICIANS AND SURGEONS, 4.
- Factors and Brokers.** See PRINCIPAL AND AGENT. REAL ESTATE BROKERS.
- False Pretenses.**
1. In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses with the intent to cheat and defraud. *Ketchell v. State*..... 324
2. In such a case, where the money was obtained upon a draft and the proof tended to show that when the defendant drew the draft he had reason to believe it would be accepted and paid, a conviction cannot be sustained. *Id.* 327
- False Representations.**
- Aultman v. Finck*..... 680
- Fees.** See CONFLICT OF LAWS. COUNTY CLERKS. JUSTICE OF THE PEACE, 1, 2.
- Fences.** See RAILROAD COMPANIES, 5-7.
- Fiduciary Relationship.** See CORPORATIONS, 9.
- Final Order.**
- Order overruling plea in abatement is not. *Gartner v. State*, 280

Findings. See ACCOUNTING. JUDGMENTS, 6. PARTNERSHIP. REVIEW, 30, 35.

Fire Insurance. See INSURANCE.

Fires. See RAILROAD COMPANIES, 2-4.

Fiscal Year. See LEGISLATIVE APPROPRIATIONS, 4.

Forcible Entry and Detainer.

In an action for the recovery of possession of farm lands and a dwelling house from defendant's alleged forcible detention of both conjunctively, plaintiff's request for an instruction which defined the rights of defendant to the whole subject of controversy, as though to be tested by his right to the possession of the dwelling house alone, was properly refused. *Wagner v. Haines* 769

Foreclosure. See CHATTEL MORTGAGES, 6. CONFLICT OF LAWS. MECHANICS' LIENS, 4. TAX LIENS.

Foreign Laws. See STATUTE OF LIMITATIONS, 2, 3, 5.

Forgery. See QUIETING TITLE.

Fraud. See CHATTEL MORTGAGES, 5. FRAUDULENT CONVEYANCES. PRINCIPAL AND AGENT, 2. SALES, 2, 3. STATUTE OF FRAUDS. STATUTE OF LIMITATIONS, 6, 7.

Fraudulent Conveyances. See CHATTEL MORTGAGES, 7. STATUTE OF LIMITATIONS, 9-12. VOLUNTARY ASSIGNMENTS, 2.

1. Fraud, within the meaning of section 12 of the Code, is discovered when the fraudulent deed is recorded in the county where the debtor lives. *Gillespie v. Cooper* 776
2. In an action to avoid a conveyance or mortgage for fraud the facts constituting the fraud must be specifically pleaded; a general allegation of fraud is insufficient. *Rockford Watch Co. v. Mansfield* 801
3. The presumption of fraud arising from the want of change of possession of mortgaged chattels is not conclusive, but may be entirely rebutted by proof of good faith. *First National Bank of Denver v. Lowrey* 291
4. The fact that a chattel mortgage was executed a few hours previous to the making of a voluntary assignment by the mortgagor for the benefit of creditors is not conclusive evidence of fraud so as to entitle the assignee to recover the mortgaged property as a part of the assigned estate. *Brown v. Farmers & Merchants Banking Co* 434
5. An instruction in a suit between the creditors of the mortgagor and the mortgagee which requires the latter, in addition to proof of good faith and absence of a fraud-

- ulent intent, to satisfactorily explain why there was not an immediate delivery of the property and an actual and continued change of possession thereof is erroneous. *First National Bank of Denver v. Lowrey*..... 291
6. A mortgage or bill of sale given by a failing debtor to secure an honest debt is not fraudulent, although the parties to the transaction knew that the claims of other creditors would be thereby defeated, provided the fair value of the property pledged as security does not greatly exceed the amount of the debt, interest, and probable expenses of foreclosure. *Id.*
7. Where a merchant in failing circumstances, intending to prefer certain creditors, executed a bill of sale, the vendee paying the preferred claims out of the consideration named in the bill of sale, it was *held* not to be an assignment for the benefit of creditors; that the vendee was the only person beneficially interested, and that the transfer was valid. *Costello v. Chamberlain*..... 45
8. In an action by a chattel mortgagee to recover possession of the property after it had been attached by certain creditors of the mortgagor it is error to instruct the jury that certain things particularly mentioned "are strong evidence of a secret trust," as it is for the jury to determine what weight should be given to the different items of evidence. *First National Bank of Denver v. Lowrey* 299
9. October 28, 1884, a debtor of various persons conveyed all her property, four lots, with a secret agreement that the grantee should sell the lots, retain the amount of debt due him from the grantor, and return the surplus property or proceeds thereof to her or the person she might designate. *Held*, A fraud upon other creditors. *Gillespie v. Cooper*... 776
10. It was *held*, that the above fraudulent conveyance was discovered by the creditors on the date it was recorded, and their suit commenced more than four years thereafter was barred; but it also appeared that while the grantee held the title to said four lots, he agreed with the fraudulent grantor, if she would find a purchaser for, or sell them, he would pay her, as commissions, all that remained of the lots or their proceeds after the payment to him of her debt. Two of the lots were sold, the grantee's debt paid, and at her request the remaining two lots were conveyed to her husband without consideration. *Held*, That the two lots thus conveyed were her property, acquired from the former grantee by purchase, and were conveyed to the husband for the purpose of defrauding her creditors. *Id.*

11. Under such state of facts, *held further*, that the latter conveyance was not a continuation or consummation of the former fraud, but a new and independent one, and as the suit of the creditors to set aside the former conveyance also assailed the latter one, and was commenced within four years from the recording of the latter, it was not barred as to the two lots last fraudulently conveyed. *Id.*
12. Where a party known by her creditors to have recently failed in business and to be insolvent, conveyed all her real estate by deed recorded October 28, 1884, in the county where she resided; and she, in conversation with her creditors at that time, said that the object of the conveyance was to beat her foreign creditors; that she had been advised to put her property out of her hands; that she intended to put her property in other hands until she could settle matters; that she had made arrangements by which she could pay all her home creditors; that there were some debts she did not feel bound to pay; that the object of the deed was to secure a debt to the grantee, and the surplus to be paid her; it was *held*, that these facts were a discovery by the creditors on the date of the recording of said deed that the same was fraudulent. *Id.*

General Denial. See PLEADING, 6.

Gift. See CREDITOR'S BILL.

Governor. See CONSTITUTIONAL LAW. STATUTES, 1.

1. It was *held* to be the governor's duty to apply unexpended balance of appropriation for books, blanks, and printing to payment of books and stationery ordered by him. *State v. Boyd* 60
2. Is vested with discretion in the use of the contingent fund appropriated by the legislature; and will not be required by *mandamus* to approve a voucher drawn against it for books and stationery ordered by him. *Id.*

Guaranty.

1. Recovery on guaranty of spring wagons for period of one year, *held* proper under facts stated in opinion. *Kansas Manufacturing Co. v. Lumry* 123
- The testimony referred to in opinion is sufficient to sustain a verdict for defendant in an action upon a written guaranty. *Wyeth Hardware & Manufacturing Co. v. Shearer*... 5

Guardian and Ward.

1. Proof by affidavit of posting public notice is not exclusive. The statute merely provides a mode which is sufficient,

but does not provide that it shall supersede all other forms of proof. *Larimer v. Wallace*..... 444

2. In a collateral attack on a guardian's sale of real estate, where all the steps required have been taken, a sale made and confirmed, and a deed made to the purchaser, the sale will be sustained if the court had jurisdiction, although there may be irregularities which in a direct proceeding would render the sale erroneous. *Id.*

Habeas Corpus.

Mere errors and irregularities in a judgment or proceeding of a court in a criminal case, under and by virtue of which a person is imprisoned, which are not of such a character as render the proceedings void, cannot be reviewed on an application for a writ of *habeas corpus*. That writ cannot operate as a writ of error. *In re Betts*..... 292

Harmless Error. See INSTRUCTIONS, 8. PLEADING, 14. REVIEW, 11, 33.

Highways.

Where a public highway is vacated and abandoned as such by lawful authority, the land included therein reverts to the abutting proprietors and cannot be appropriated by a railroad company for right of way without making compensation to such proprietors. *Omaha S. R. Co. v. Beeson*, 362

Hold-Over Officers. See OFFICE AND OFFICERS, 3.

Holidays.

1. An order made by a judge on Sunday or a legal holiday, allowing an attachment in an action on a debt not due is void. *Merchants National Bank v. Jaffray* 218
2. An order of attachment on a claim past due is a ministerial act and may be made on a legal holiday. *Whipple v. Hill* 720

Holt County.

Boundaries clearly defined and do not include any part of the territory organized as Boyd county. *State v. Van Camp* 91

Homesteads.

1. A homestead may be claimed in lands held in joint-tenancy. *Giles v. Miller*..... 346
2. Neither the husband nor wife can be estopped by the acts of the husband alone from asserting homestead rights. *Id.*
3. An undivided interest in real estate accompanied by the exclusive occupancy of the premises by the owner of such

interest and his family as a home, is sufficient to support a homestead exemption. *Id.*

4. Courts will not specifically enforce a contract for the sale of the homestead of a married person, unless it is executed by both husband and wife. The value of the property does not change this rule. *Clarke v. Koenig*..... 572
5. Under the homestead law of 1879, the purchaser of land held and occupied at the time of the conveyance as the homestead of the grantor, and which does not exceed in value the sum of \$2,000, takes the same free from the lien of a judgment docketed prior to such purchase, but during the existence of the homestead right. *Giles v. Miller*, 346

Horse Railways. See MASTER AND SERVANT, 2, 3. STREET RAILWAYS.

Husband and Wife. See HOMESTEADS, 4.

Under the provisions of sec. 1, ch. 53, Comp. Stats., which declare "that all property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessities furnished the family of said married woman after execution against her husband for such indebtedness has been returned unsatisfied," the wife is in fact surety for her husband and judgment must be recovered against her before her separate estate can be levied upon and sold for such necessities. *George v. Edney*..... 604

Hypothetical Questions. See REVIEW, 39, 41.

Identification. See POWER OF ATTORNEY.

Identity of Names. See VENDOR AND VENDEE, 3, 4.

Impeachment. See ACKNOWLEDGMENT. SUMMONS, 3. WITNESSES, 1, 3.

Indemnity. See ATTACHMENT, 3.

1. Where an officer, by collusion and fraud, permits a judgment to be wrongfully rendered against him for levying upon goods under a writ of attachment, these facts may be pleaded in an action on the indemnity bond, together with a statement of the plaintiff in attachment that the property levied upon was that of the debtor in attachment. *Mihalovitch v. Barlass* 491
2. In an action upon an indemnity bond the fact that an officer permits judgment to be rendered against him for an alleged wrongful levy without making a defense, although a circumstance which with others may show fraud, yet in order to do so it must appear that a defense was available. *Id.*

Indexes. See **VENDOR AND VENDEE**, 3, 4.

Indictment and Information.

1. A defect in the verification of an information is waived by pleading to the information. *Bailey v. State*..... 808
2. Objection to an information on the ground that it was verified before a notary public instead of a magistrate should be made before going to trial, otherwise it will be held to have been waived. *Hodgkins v. State*..... 160
3. It is not necessary in an information or indictment to use the precise words of the statute. It is sufficient if the words used are identical in meaning with those used in the statute. *Id.*
4. In charging an offense under a statute the general rule is that a negative averment of the matter of a proviso is not required in an information, unless the matter of such proviso enters into and becomes a part of the description of the offense, or is a qualification of the language defining or creating it. *Gee Wo v. State*..... 241
5. Where, however, the matters of the proviso point directly to the character of the offense, or where the statute includes two or more classes which will be effected thereby, such as physicians who remove into the state to practice after the passage of an act to regulate the same, and persons who were residing in the state and practicing under a former act, in such cases the information must show on its face that the accused does not belong to either class. *Id.*

Indorsers. See **NEGOTIABLE INSTRUMENTS**, 11.

Infants.

- One who elects to disaffirm a contract on the ground that at date of execution he was an infant is required to return so much of consideration as remains in his hands at time of such election, but not an equivalent for what he disposed of during his minority. *Bloomer v. Nolan*..... 51

Information. See **INDICTMENT AND INFORMATION**.

Injunction. See **REVIEW**, 30.

1. A court of equity will not enjoin the collection of a judgment at law on account of mere irregularities or errors on the part of the trial court. *Pollock v. Boyd*..... 309
2. A judgment of revivor not appealed from will not be enjoined upon the same grounds that were set forth in the answer in the case where it was rendered. *Haynes v. Aultman*..... 257

3. Cannot be maintained by owner of property against adjoining lot owner, to restrain interference with barriers erected and maintained by plaintiff to prevent flow of surface water on plaintiff's lot, where it appears the defendant's acts were in rightful defense of his own possession. *Davis v. Sullivan*..... 69
 4. In an action to enjoin certain taxes assessed by the local assessor upon material for the construction of a railroad which was piled up near Central City, and had so remained for a long time, *held*, that the material was taxable, and in the absence of proof that it had been assessed by the state board, there was no presumption to that effect and that the taxes assessed by the local assessor would not be enjoined. *Chicago, B. & Q. R. Co. v. Merrick County*..... 176
- Injuries.** See CARRIERS, 5, 9. PHYSICIANS AND SURGEONS, 1, 3.
- Inland Bills of Exchange.** See NEGOTIABLE INSTRUMENTS, 11.
- Insanity from Intoxication.** See CRIMINAL LAW, 6.
- Insolvency.** See BANKS AND BANKING. CREDITOR'S BILL. FRAUDULENT CONVEYANCES, 6. NEGOTIABLE INSTRUMENTS, 17. PREFERRED CREDITORS.
- Inspection of Books.** See EVIDENCE, 16.
- Instructions.** See CRIMINAL LAW, 6. DAMAGES. EVIDENCE, 16. FORCIBLE ENTRY AND DETAINER. FRAUDULENT CONVEYANCES, 8. MUNICIPAL CORPORATIONS, 7. NEGOTIABLE INSTRUMENTS, 14. QUANTUM MERUIT. RAILROAD COMPANIES, 6. REVIEW, 27.
1. Given in replevin case approved. *Hakanson v. Brodke*.... 42
 2. It is proper for a court to refuse an instruction covered by one already given. *Barton v. McKay*..... 633
 3. In case stated relative to computation of interest on a demand certificate of deposit approved. *Morse v. Rice*..... 212
 4. In trial of person charged with commission of rape set out in opinion approved. *Richards v. State* 23-26
 5. Where the instructions, considered as a whole, fairly state the law, they are sufficient. *Barton v. McKay*..... 641
 6. An erroneous instruction is not cured by merely giving another on the same subject contradicting it. *First National Bank of Denver v. Lowrey* 290
 7. It is reversible error for the court, in its charge to the jury,

to give undue prominence to a portion of the testimony by special reference thereto, or to direct the jury what weight shall be given to particular items of the evidence.

Id...... 291

8. Should be given clearly, concisely, and without contradictory statements of the rules by which the jury should be governed. If, however, the instructions are not in compliance with this requirement, the verdict will not be set aside, if, upon the evidence, no other verdict could be sustained. *Jansen v. Williams* 869
9. A general exception to instructions, as "to the giving of the above instructions the plaintiff then and there excepted," is insufficient to lay the foundation for their review in the supreme court. Exception should be specifically taken to each paragraph of the charge claimed to be erroneous. *First National Bank of Denver v. Lowrey*, 290

Insurance.

1. A contract of fire insurance is one of indemnity in case of loss or damage by fire. Like any other contract, it should be sustained if possible. *Union Ins. Co. v. Barwick*..... 223
2. A provision in a policy of insurance for arbitration is of no force where the insurance company denies its liability. *Id.*, 224
3. Where proof of loss is furnished to the insurance company to which it objects, it must return the same with its objections within a reasonable time or its objections will be unavailing. *Id.*
4. A mortgage of chattels to secure a contingent liability of the mortgagee as indorsee and under which the mortgagee does not take possession is not such change of title as to avoid the policy. *Id.*..... 224
5. Provisions of a policy in conflict with the valued policy act of 1889 are inoperative. This applies to a provision in case of loss for the appointment of arbitrators. *German Ins. Co. v. Eddy* 461
6. Where all the combustible material in a building is destroyed by fire, although portions of the brick walls are left standing, but are so injured by the fire that they must be torn down, for the purpose of insurance the property is totally destroyed. *Id.*
7. Under the issues made by the pleadings in case considered in opinion the principal question was whether or not the property had been "totally destroyed," and this question was fairly submitted to the jury and the verdict is supported by the evidence. *Id.*

8. An action was properly brought in the name of the insured where he had made an assignment of the policy with the consent of the company to secure the assignee upon a contingent liability as indorser of notes, and gave a chattel mortgage upon the insured goods for the same purpose, and afterwards paid the notes and released the assignee from liability. *Union Ins. Co. v. Barwick*..... 223

Interest.

- A demand certificate of deposit, in the absence of any agreement as to interest, draws interest at the rate of seven per cent from the time payment is demanded; and in case no demand has been made, then from date of commencement of suit. *Morse v. Rice*..... 219

Interlocutory order.

- Cannot be reviewed in supreme court until after final judgment. *Gartner v. State*..... 260

Interpleader. See INTERVENTION.

Interpretation of Contract. See CONFLICT OF LAWS.

Intervention.

- To entitle a third party to intervene in an action he must have some interest in the subject of the controversy. A mere contingent liability to answer over to the defendant, without any privity with the plaintiff, is not sufficient. *Omaha S. R. Co. v. Beeson* 361

Intoxicating Liquors. See LIQUORS.

Intoxication. See CRIMINAL LAW, 6.

Joint Owners. See REPLEVIN, 10.

Joint Tenancy. See HOMESTEADS, 1, 3.

Judgments. See APPEAL, 4. APPEARANCE. DEEDS, 3. HOMESTEADS, 5. HUSBAND AND WIFE. MORTGAGES, 1, 2, 7. RES ADJUDICATA. REVIEW, 23, 31. VENDOR AND VENDEE, 3-5. VOLUNTARY ASSIGNMENTS, 3.

1. Cannot be reviewed by *habeas corpus*. *In re Betts* 269
2. Of revivor, will not be enjoined, where no appeal was taken, upon the same grounds set forth in the answer. *Haynes v. Aullman* 257
3. A judgment rendered in the county court on default may be set aside under section 1001 of the Code, though the amount exceeds \$200. *McCormick Harvesting Machine Co. v. Schneider* 206
4. A judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any

- statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity. *Lincoln National Bank v. Virgin*..... 735
5. Appearance in an action in the county court for the sole purpose of objecting to the jurisdiction does not deprive a party of the right to have judgment rendered against him by default set aside under section 1001 of the Code. *McCormick Harvesting Machine Co. v. Schneider* 206
6. The findings and judgment in a case must be based upon the pleadings. A decree in an action between a mortgagor and certain mortgagees of chattels, whereby a mortgage not attacked by the pleadings, and the holder thereof is not a party to the action, is declared void, is erroneous. *Rockford Watch Co. v. Manifold*..... 803
7. Where, in an action brought in the county court within the jurisdiction of a justice of the peace, the defendant enters his appearance, but absents himself on the day of trial, he is not entitled to have the judgment against him set aside under the provisions of section 1001 of the Code, but may prosecute an appeal to the district court. *Sullivan v. Benedict*..... 409
8. Where service upon a defendant is made by leaving a copy of a summons at his residence and judgment is taken against him thereon by default, he may, in an action to revive the judgment, show that the place of service was not his place of residence; that he nor any member of his family had notice of the action until after judgment had been rendered against him, together with any other defense to the judgment. *Haynes v. Aultman* 257
9. The petition to foreclose a first mortgage, against a junior mortgagee, and the common mortgagor alleged that the junior mortgagee "claims some interest in the premises, the nature and extent of which is to plaintiff unknown, but is subordinate to plaintiff's claim, wherefore plaintiff asks that it be compelled to set the same up or be forever barred." All the defendants having made default a decree of foreclosure was entered in which it was found the junior mortgagee had no right, title, or interest in the mortgaged property. In a subsequent action by the junior mortgagee to foreclose its mortgage, held, that the former decree cannot be pleaded in bar by the mortgagor or his grantees. *Lincoln National Bank v. Virgin* 735

Judicial Acts. See HOLIDAYS.

Judicial Interpretation. See SUPREME COURT.

Jurisdiction. See APPEAL, 2. APPEARANCE. CONSTITUTIONAL LAW. COUNTY COURTS. JUSTICE OF THE PEACE, 2. MUNICIPAL CORPORATIONS, 3. PRACTICE, 3. RECEIVERS. RELIGIOUS SOCIETIES. TAX LIENS, 1.

Jury. See REVIEW, 32. TRIAL, 3.

1. A juror is not permitted to state to fellow jurors, while considering verdict, facts within his personal knowledge; but should make the same known during trial and testify as a witness. *Richards v. State*..... 17
2. A juror will not be permitted to state to his fellow-jurors, while they are considering their verdict, facts in the case within his own personal knowledge but not given in evidence. He should make the same known during the trial and, if desired, testify as a witness in the case. *Wood River Bank v. Dodge* 706
3. It is sufficient cause of challenge to any person called as a juror in the district court that he has been summoned and attended that court as a juror at any term held within two years prior to the time of such challenge, and this rule applies to talesmen who were summoned and served as jurymen. *Wiseman v. Bruns*..... 467

Jury Trial.

On appeal by the executor or heir at law from an order of the county court making an allowance out of the funds of the estate of a deceased person for the support of his widow, the district court will try and determine the issues involved in the same manner as on appeal in civil cases. It is error in such case to refuse a jury trial upon the demand of either party to the controversy. *Sheedy v. Sheedy*. 373

Justice of the Peace. See CONTINUANCE, 3.

1. Justice of the peace is not allowed to charge a fee for entry of default of a defendant. *Van Etten v. Selden*..... 212
2. A justice of the peace has no jurisdiction to sit as a trial court in a criminal case where the statute creating the offense provides that the punishment may be both a fine and imprisonment. In such case the justice can proceed only as an examining magistrate. *State v. Yates*..... 287
3. Under sec. 32, ch. 28, Comp. Stats, a justice of the peace before bringing suit for fees must, when requested, make and furnish the party for whom the services were rendered an itemized bill of his costs in order to maintain an action therefor; but such statement may be waived by the party entitled thereto. *Van Etten v. Selden*..... 209

Labors. See EXEMPTIONS.

Laches. See **APPEAL**, 2. **EQUITY. SPECIFIC PERFORMANCE**, 4.

Lapse. See **LEGISLATIVE APPROPRIATIONS**, 4.

Larceny.

Evidence set out and discussed in the opinion *held* insufficient to support a verdict of guilty. *Carter v. State*..... 481

Legislative Apportionment. See **ELECTIONS**, 9.

The legislature never having attached the territory comprising Boyd county to any representative district, it remains a part of the 20th district, notwithstanding its organization as a county. *State v. Van Camp* 92

Legislative Appropriations. See **GOVERNOR**.

1. Under the provisions of the act making an appropriation for the current expenses of the state for the years ending March 31, 1892, and March 31, 1893, approved April 6, 1891, whereby an appropriation of \$37,000 was made for fire-proof library building at the state university, no part of said appropriation can be drawn except upon proper vouchers filed with the auditor of public accounts. *State v. Moore* 579
2. The term voucher, when used in connection with the disbursement of money, means a written or printed instrument in the nature of a bill of particulars, which shows on what account and by what authority a particular payment has been made. *Id.*
3. There is no authority for the secretary of the board of regents of the state university to draw any money appropriated for the university or any of its buildings except upon vouchers duly certified. *Id.*
4. No appropriations made by the legislature will lapse before the end of the first fiscal quarter after the adjournment of the next regular session, unless there is a special provision in the act itself providing that if it is not used by a certain time that it shall lapse. The fiscal year begins on the first day of December of each year. *Id.*

Letters. See **EVIDENCE**, 12.

Letters of Credit. See **CONTRACTS**, 4, 7.

Levy. See **INDEMNITY**.

Lex Fori. See **CONFLICT OF LAWS**.

Liability of Stockholders. See **CORPORATIONS**, 3-5.

License. See **LIQUORS**.

License Bond. See **LIQUORS**, 3-5.

Lien of Judgment. See **HOMESTEADS**, 5.

Lien on Crop. See **CHATTEL MORTGAGES**, 8.

Liens. See **CHATTEL MORTGAGES**, 4. **REPLEVIN**, 12.
VENDOR AND VENDEE, 3, 4.

Limitation of Actions. See **EQUITY. FRAUDULENT CONVEYANCES**, 9-12. **MECHANICS' LIENS**, 4. **STATUTE OF LIMITATIONS**.

Liquors. See **MUNICIPAL CORPORATIONS**, 4, 5.

1. It is not necessary to state in a petition for a liquor license whether the applicant desires to sell at wholesale or retail. *Brown v. Lutz* 523
2. No license for the sale of intoxicating liquors issued by a city of the second class containing a population of less than five thousand can extend beyond the municipal year in which it shall be granted. *Id.*
3. An undertaking will be strictly construed in favor of sureties, and their liability will not be extended by construction beyond their specific agreement; rule applied to sureties on statutory bond of vendor of liquors. *Curtis v. Atkinson* 110
4. The term traffic in intoxicating drinks, as used in sec. 15, ch. 50, Comp. Stata., will in an action on a license bond be held to mean the sale or furnishing of liquors to third persons, and not the use thereof by the saloon-keeper. *Id.*
5. A saloon-keeper while intoxicated in his own saloon shot and killed plaintiff's husband: *Held*, That the drinking of the liquor by the saloon-keeper was not traffic in intoxicating liquor within the meaning of the law, or such as will render his sureties liable in an action upon his bond. *Id.*
6. Where a remonstrance in opposition to an application for a liquor license denies that the petition is signed by the requisite number of resident freeholders, the burden is upon the applicant to prove by competent evidence that the same is signed by the required number of qualified petitioners, and if he fails so to do, a license should be refused. *Brown v. Lutz* 523
7. Action cannot be taken by a city council on an application for a liquor license until at least two weeks' notice of the filing thereof has been given in the mode provided by law. *Id.* 523
8. Notice was held sufficient, where publication was made for two consecutive weeks commencing June 2, 1892, and it appeared that a remonstrance was filed June 16, and by

stipulation of counsel no action was taken thereon until June 21, though the paper containing the notice was not deposited in the post-office until June 3, since more than two weeks elapsed after that date before the city council took any action upon the application. *Id.*

Live Stock. See CARRIERS, 7, 8. RAILROAD COMPANIES, 5-7.

Malicious Prosecution.

1. On the trial of the accused charged with the commission of a criminal offense, by a jury in justice court, the jury found specially "that the complaint was made without probable cause." In an action for malicious prosecution subsequently brought by the accused against the person filing the criminal complaint, such special finding should not be set forth in the petition, and having been copied therein should be stricken out on motion. *Obernalle v. Johnson* 772
2. On the trial of the case last stated the verdict of the jury in justice court acquitting plaintiff was offered in evidence. *Held*, That part of the verdict acquitting plaintiff was admissible, although the answer admitted plaintiff had been tried and acquitted. *Held, further*, It was error to permit the special finding to be read in evidence to the jury. *Id.*
3. The foregoing errors were, however, cured by the instructions of the court, and were held to be without prejudice. *Id.*

Malpractice. See PHYSICIANS AND SURGEONS.

Mandamus. See CONSTITUTIONAL LAW. GOVERNOR, 2. PRACTICE, 2.

1. The writ of *mandamus* will not be used to control an officer in the exercise of his discretion. *State v. Boyd*..... 60
2. A relator having a personal right to be enforced by *mandamus* may bring an action in the name of the state on his relation. *State v. Spicer* 469
3. Will lie on relation of school district in cities of second class to compel county commissioners to levy school tax. *State v. Paddock*..... 263
4. Court in *mandamus* proceeding to require county clerk to issue certificate of election will not inquire into the regularity of the nomination, or certificates of nomination of the candidates. *State v. Van Camp*..... 81
5. Writ will lie to compel county clerk to issue a certificate of election to the person appearing from the face of the

returns to have been elected a member of the legislature, but the certificate will not conclude the legislature in contest proceedings. *Id.*

6. Will issue to compel an ex-county treasurer to pay into the treasury money retained by him for salary during the time the duties of the office were performed by a *de facto* officer who had been paid his salary by the county before the *de jure* officer assumed the duties of the office. *State v. Milne*..... 301
7. While *mandamus* is not the appropriate mode of trying the question of strict title to an office, yet, in such a proceeding brought to compel the respondent to approve the official bond, tendered by the relator, sufficient inquiry may be made to ascertain whether or not the relator's certificate of election or appointment is *prima facie* evidence of title to the office. *State v. Plambeck*..... 401
8. One who in good faith attends upon a public sale of property for delinquent taxes at the time named in the advertisement and requests the treasurer to offer the delinquent property for sale, and demands the right to bid therefor, has such an interest therein as will entitle him to prosecute proceedings by *mandamus* to compel the treasurer to discharge his duty by offering said property for sale. *State v. Farney*..... 538
9. Where in a partition suit the real estate has been sold, the sale confirmed, deeds made to the purchaser, the proceeds paid by a referee to the clerk of the district court as trustee, and the referee relieved of his trusteeship under an order of the court, *mandamus* will lie on relation of a person entitled to a portion of the proceeds, consisting of money and notes, to compel the clerk to make payment. *State v. Spicer*..... 477-8

Marriage. See NEW TRIAL, 5.

Marriage is a civil contract requiring in all cases for its validity only the consent of parties capable of contracting. The fact of marriage may be proved by the testimony of one of the parties. *Bailey v. State*..... 808

Married Women. See HUSBAND AND WIFE.

Master and Servant.

1. The question presented by the pleadings was whether or not the servant was employed by a firm and rendered services for it, or whether he was employed by one of the partners, his father, and represented him as a member of the firm. The evidence referred to in the opinion was

- Held* to establish the fact that the servant was employed by and r presented his father, and that the firm was not liable for the services. *Glade v. White*..... 172
2. It is the duty of a master to furnish his servants with such appliances for his work as are suitable and may be used with safety, and if the servant is injured by reason of defective appliances furnished by his master, the latter will be liable for damages unless he can show that he used due care in the selection of the same. *Leigh v. Omaha Street R. Co* 131
 3. The driver of a street car propelled by horses was given a span of horses to propel the car, one of which was a broncho and would kick when struck, which fact was known to the master, but of which the driver was not aware and was not informed by the master. The car was under the care of a conductor, who permitted the same to be overcrowded, every available foot of space, both in the car and on the platform, being filled. On attempting to start the car the broncho refused to pull, whereupon the driver, who was crowded close to the broncho, slapped it with the lines, when it kicked him in the abdomen, causing death in a few hours. *Held*, That there was sufficient testimony to submit the questions of fact to a jury. *Id*..... 132
 4. A servant was employed for one year at a salary as superintendent and general manager of a packing house, but was discharged before the expiration of the year. In an action to recover salary for the unexpired term of employment, testimony showing that he did not attend to his duties faithfully and efficiently; that he used intoxicating liquor in considerable quantities and permitted foremen immediately under him to use it; and that it was constantly kept on hand and continually used, was sufficient to justify the discharge. *Armour-Cudahy Packing Co. v. Hart*..... 166
 5. In an action for wrongful discharge before the termination of employment it appeared that the plaintiff contracted for the service of himself and son for a given time at a certain rate per month. He alone went into the service, and was discharged before the expiration of the time fixed by the contract. It did not appear that he ever tendered the services of his son, or that the latter was ready or willing to enter the employment of defendant. *Held*, That the discharge was not a breach of the contract for which he could recover in an action for being wrongfully discharged, although he may recover in a proper action for the value of his services. *Hale v. Sheehan*..... 439

Measure of Damages. See **DAMAGES.**

Mechanics' Liens.

1. In a foreclosure proceeding the proof referred to in the opinion failed to show a new promise of the purchaser of the property to pay the debt. *Burlington v. Cooper*. 73
2. The property of an infant is not subject to a mechanic's lien for material purchased during infancy; and retaining property after attaining majority is not such ratification as gives validity to the lien. *Bloomer v. Nolan*. 51
3. In a suit to foreclose a mechanic's lien, where other incumbrancers by answer deny the facts necessary to create the lien, it is necessary for the mechanic's lienor, in order to establish his lien as prior to such other incumbrances, to prove such facts, including the time of commencing labor or of furnishing material. *Henry & Coatsworth Co. v. McCurdy*. 863
4. Continue in force for two years after the date of filing the lien, and, in case an action is brought to foreclose the same, until judgment is recovered and satisfied. If a summons is issued before the expiration of the two years from the filing of the lien, it may be served afterward within the statutory time, but if not issued until after the expiration of two years, an action to enforce the lien will be barred. *Burlington v. Cooper*. 73

Medicine. See **PHYSICIANS AND SURGEONS.**

Memorandum of Contract. See **STATUTE OF FRAUDS.**

Merchandise. See **CHATTEL MORTGAGES, 4.**

Metropolitan Cities. See **MUNICIPAL CORPORATIONS.**

Ministerial Act. See **HOLIDAYS.**

Ministers. See **RELIGIOUS SOCIETIES.**

Misconduct of Jury. See **JURY, 1, 2.**

Misjoinder of Causes of Action. See **PLEADING, 2.**

Mixtion. See **CONFUSION OF GOODS.**

Mortgages. See **CONFLICT OF LAWS. CORPORATIONS 6, 7. JUDGMENTS, 9. STATUTE OF LIMITATIONS, 4.**

1. Where several notes, secured by one mortgage, are transferred to different persons, such transfer amounts to an assignment *pro tanto* of the mortgage, and the several holders thereof will be entitled to share *pro rata* in the proceeds of the mortgaged property. *Todd v. Cremer*. 430
2. A decree of foreclosure, to which the holders of the other

notes secured by the same mortgage is not made a party, is not a bar to a subsequent foreclosure proceeding by the holder of such notes. *Id.*

3. Liability of grantee of mortgaged premises, under deed requiring him to pay mortgaged debt, should be established by very clear proof, where he denies the debt and the delivery of the deed, and the premises are of less value than the incumbrance. *Stuart v. Hervey*..... 1
4. An objection to the omission in a petition to foreclose a mortgage, of the averment that no proceedings have been had at law for the collection of the debt secured thereby, must be made prior to the rendition of the decree, as it relates to matter in abatement, and not to a fact affecting the validity of the mortgage. *Henry & Coatsworth Co. v. McCurdy*..... 863
5. Whether a petition may at any time be attacked because of the omission of such averment by another incumbrancer, seeking to foreclose his lien in the same action, *quere. Id.*
6. The owner of securities sent them to a bank for collection. The president of the bank personally received the proceeds. He subsequently executed a mortgage in his individual capacity to the owner of the securities, and it was held that the consideration was sufficient. *Griffin v. Chase*, 334
7. Under the pleadings and proof discussed in opinion, held, that the plaintiff is not entitled to a deficiency judgment against certain parties who had made a conditional contract to discharge incumbrances upon the real estate. *Security Company of Hartford v. Eyer*..... 507
8. The rule is that a default by a party defendant is a confession only of such matters as are properly alleged in the petition or complaint; but a recognized exception to that rule is that where, in a foreclosure or other kindred proceeding, a defendant, who is called upon to disclose or set up his supposed but unknown interest in the subject of the action, makes default, he will be held to have admitted that his interest therein is subject to that of the plaintiff. *Lincoln National Bank v. Virgin*..... 735

Motions. See ATTACHMENT, 4. REVIEW, 9.

Affidavits used in the district court on the hearing of a motion, to be available in the supreme court, must be preserved in a bill of exceptions. *Barton v. McKay* 634

Motions for New Trial. See REVIEW, 24, 26, 28.

Municipal Corporations. See LIQUORS, 2, 7. STATUTES, 2, 3. STREET RAILWAYS, 3.

1. The property of the state, counties, or school districts is not liable for special assessments for paving or otherwise improving the streets of cities of the second class having over 5,000 and less than 25,000 inhabitants. *Von Steen v. City of Beatrice* 421
2. It is proper to admit evidence to show that the rental value of plaintiff's property has been depreciated by the construction of a viaduct in front of plaintiff's lot in an action against the city for damages. *City of Omaha v. Hansen* 135
3. A petition to confer jurisdiction upon the city council to order the paving of streets in any paving district of cities having over 5,000 and less than 25,000 inhabitants must be signed unconditionally by the owners of a majority of the feet fronting thereon. *Von Steen v. City of Beatrice*... 421
4. A section of a city ordinance regulating the license and sale of liquors is not invalid as unreasonable and unjust because it provides that no chairs or seats of any kind shall be placed in any saloon, and fixes a penalty for violation thereof. *Brown v. Lutz*..... 527
5. In a city of the second class, containing a population of less than 5,000, an ordinance of a general character may be presented, read, and adopted by the city council thereof on the same day, provided the rule requiring such ordinance to be fully read on three different days is dispensed with by a vote of three-fourths of the members of the council. *Id.*
6. In an action against a city for damages caused by constructing a viaduct thirty feet above plaintiff's lot it was held not error to instruct the jury that the general increase of travel upon the street caused by the erection of the viaduct is not a special benefit, and cannot be deducted from the amount of damages sustained. *City of Omaha v. Hansen*. 137, 138
7. In an action for personal injuries caused by a fall resulting from a defective sidewalk it was not error to instruct the jury that it is the duty of the city to keep and maintain its sidewalks in good repair for the safe and convenient use of the traveling public walking and passing thereon. *City of Grand Island v. Oberschulte*..... 696
8. A non-resident, in passing from the Union Pacific station in South Omaha to Twenty-third and P streets in the night season, went east on N to Twenty-fourth street, then south

on Twenty-fourth street nearly to O, when he noticed stairs about ten feet in height in front of a private residence. He ascended the stairs which he mistook for those on a block near the point of his destination, and continuing fell into an excavation caused by grading O street, and was injured. *Held*, That the proof failed to show negligence on the part of the city. *Gilchrist v. City of South Omaha* 163

National Banks. See BANKS AND BANKING, 2. STATUTE OF LIMITATIONS, 1.

Negative Averment. See INDICTMENT AND INFORMATION, 4, 5.

Negligence. See CARRIERS. COUNTIES, 2, 3. MASTER AND SERVANT, 2, 3. MUNICIPAL CORPORATIONS; 8. NEGOTIABLE INSTRUMENTS, 15. RAILROAD COMPANIES.

Where different minds may draw different inferences from the same state of facts, as to whether such facts establish negligence, it is a proper question for the jury and not for the court. But that rule is subject to the qualification that the inference of negligence must be a reasonable one. Where it is impossible to infer negligence from the established facts without reasoning irrationally and contrary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant. *Chicago, B. & Q. R. Co. v. Lawdner* 642

Negotiable Instruments. See ASSIGNMENTS. CONTRACTS, 4, 7. INTEREST. SUBROGATION. USURY, 4, 5.

1. *Clapham v. Storm* 499
2. Sufficiency of proof to show authority of corporation to execute. *Metropolitan Building & Loan Ass'n v. Van Pelt*, 3
3. Bank checks are due upon presentation, and not entitled to days of grace. *Wood River Bank v. First National Bank of Omaha* 744
4. A provision in a note executed since June 1, 1879, for the payment of attorneys' fees for collection is invalid. *Security Company of Hartford v. Eyer* 507
5. The failure of consideration for a negotiable instrument is no defense to an action by *bona fide* purchasers without notice. *Lanning, Antram & Co. v. Burns* 236
6. Where note was given for purchase of spring wagon, sold on written guaranty, the failure to comply with guaranty under facts stated, *held*, a good defense. *Kansas Manufacturing Co. v. Lumry* 123

7. The possession of a promissory note by the maker after maturity thereof is *prima facie* evidence of payment. *Smith v. Gardner*..... 741
8. In action on negotiable instrument, as between the parties to the instrument and persons not *bona fide* purchasers for value before maturity, a partial defense is available. *Lanning, Antram & Co. v. Burns* 236
9. The term "protest," as applied to inland bills of exchange, includes only the steps essential to charge the drawer and indorser. *Wood River Bank v. First National Bank of Omaha* 744
10. The general rule is that where a bank delivers a note or bill to a notary public for demand, protest, and notice, it will not be liable for the default of the latter. *Id.*..... 745
11. Bank checks in this country are regarded as inland bills of exchange for the purpose of presentment and demand, and notice of dishonor, and do not require a formal protest in order to charge the indorsers. *Id.*..... 744
12. Where, in an action on a negotiable check, payment of which had been stopped by the drawer, the answer admitted a portion of the indebtedness, and alleged a partial failure of consideration, the plaintiff should recover the amount admitted to be due, and judgment in favor of defendant could not be sustained. *Lanning, Antram & Co. v. Burns* 236
13. Where undisputed proof showed a want of consideration for a promissory note, and the proof failed to clearly establish the fact that the plaintiff was a *bona fide* purchaser for value before maturity, a verdict and judgment in favor of the defendant will not be set aside. *Hooper v. Grewell*, 596
14. The force of the presumption of payment from the possession of a note by the maker depends upon the circumstances of the particular case. It is error, therefore, to instruct the jury that possession of a note raises a strong presumption of payment or is a strong circumstance to prove payment. *Smith v. Gardner*..... 741
15. Where a bank delivers a note or bill to a notary public for demand, protest, and notice, and such note or bill remains in the bank to be protested for non-payment by the president and manager thereof, a notary public, and who, although aware of the instructions to the contrary, delays noting for protest or giving notice, in consequence of which the indorsers are discharged, such notary will be held to be the agent of the bank, and the latter will be liable for

his negligence. *Wood River Bank v. First National Bank of Omaha*..... 745.

16. A bank receiving for collection from a correspondent checks drawn upon it by a customer, with instructions to protest in case of non-payment, is required, in case payment is refused for want of funds, to give notice to the bank from which they were received not later than the next day after the dishonor. And when they are held for two days in order to enable the drawer to provide funds for payment thereof a jury would be warranted in finding that the bank intended to accept them and become liable thereon. *Id.*..... 744.

17. The main issue in the trial of an action on a note being whether the note sued upon was given by the defendant as payment for the other fifty per cent due from defendant to plaintiffs (fifty per cent having already been paid upon a general composition agreement of the maker of the note with his creditors), or whether said note was given plaintiffs for services by plaintiffs' agent rendered for defendant, independently of such agency, it was proper to instruct the jury: 1. That if plaintiffs with the maker of the note entered into such a composition agreement, a note taken for the fifty per cent by said composition rebated would be a fraud upon the rights of the other compounding creditors, and that payment thereof would not therefore be enforced. 2. Instructions as to the rights of plaintiffs, upon their theory of the transaction, properly required upon the evidence adduced that the jury should "believe from the testimony that such a transaction was made in good faith, and not as a device to evade the effect of a payment to the plaintiffs directly." *Freiberg v. Treitschke*..... 830.

New Promise.

In a proceeding to foreclose a mechanic's lien the proof referred to in the opinion failed to show a new promise of the purchaser of the property to pay the debt. *Burlington v. Cooper*..... 73.

New Trial. See REVIEW, 25, 27.

1. Should be allowed when it is clear that material contradicted evidence has been disregarded by the jury, and which, if considered and given due weight, would have required a different verdict from that returned. *Chicago, B. & Q. R. Co. v. Landauer*..... 642.

2. A motion for a new trial should be granted on the ground of newly discovered evidence tending to impeach a witness by showing declarations contradicting his testimony,

where such evidence is of so controlling a character that it would probably change the verdict. *Bailey v. State*..... 809

3. To entitle a party to a new trial on account of newly discovered evidence, it is not enough that the evidence is material and not cumulative; it must further appear that the applicant for the new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial. *Fitzgerald v. Brandt*..... 833
4. A motion for a new trial on the ground of newly discovered evidence was properly denied, when such new evidence was competent under the pleadings in the case; and the witness who was to furnish the new evidence testified on the trial, was examined by the applicant for the new trial, and in which examination no effort was made to elicit any of the facts now claimed to be newly discovered evidence. *Id.*
5. In a prosecution for adultery the only evidence of defendant's marriage was that of the complaining witness, the woman alleged to be defendant's wife. The marriage relied upon was by words of consent without the presence of a solemnizing officer or of witnesses. A new trial was asked on the grounds of newly discovered evidence, the affidavits removing every question of negligence in procuring the evidence. The newly discovered evidence alleged consisted of the declaration of the complaining witness contradicting her testimony as to the marriage. *Held*, That under these circumstances the motion should have been sustained. *Bailey v. State*..... 809

Newly Discovered Evidence. See NEW TRIAL, 2-5.

Non-Resident. See EMINENT DOMAIN, 1. STATUTE OF LIMITATIONS, 4.

Notary Public. See NEGOTIABLE INSTRUMENTS, 15.

Notice. See BILL OF EXCEPTIONS, 2. CHATTEL MORTGAGES, 8. CORPORATIONS, 3, 4. FRAUDULENT CONVEYANCES, 9-12. GUARDIAN AND WARD. LIQUORS, 7, 8. NEGOTIABLE INSTRUMENTS, 10-16. REGISTRATION.

Objections. See COUNTY SEAT, 4. INDICTMENT AND INFORMATION, 2. INSURANCE, 3. PLEADING, 11. REVIEW, 38. TRIAL, 4. WITNESSES, 4.

Occupancy. See HOMESTEADS, 3.

Office and Officers. See COUNTIES, 1, 4, 5. COUNTY CLERKS. GOVERNOR. MANDAMUS, 7. STATUTES, 1. TAX SALES, 2, 3.

1. The title to an office cannot be tried and determined on an application for a writ of *mandamus*. *State v. Plambeck*..... 401
2. Where a claimant of an office sues a *de facto* officer to recover the emoluments thereof received by the latter, the plaintiff's title to the office is put in issue, and in order to recover he is required to prove that he is the *de jure* officer. *Richards v. McMillin*..... 352
3. Where an officer who is entitled to hold over fails to qualify as his own successor within ten days after it is ascertained that the person who was elected to succeed him is ineligible, he loses his title to the office and he cannot recover the emoluments thereof. *Id.*.....357, 358

Officers. See BANKS AND BANKING, 1.

Officer's Return. See SUMMONS, 3.

Official Capacity. See DEEDS, 2.

Onus Probandi. See APPEARANCE. CORPORATIONS, 1, 6.
LIQUORS, 6.

Opening and Closing. See TRIAL, 2.

Orders. See COUNTY BOARD. EVIDENCE, 16. FINAL ORDER.

Ordinances. See MUNICIPAL CORPORATIONS, 4, 5.

Parol Contracts. See STATUTE OF FRAUDS, 2.

Parties. See CHATTEL MORTGAGES, 6, 7. DEEDS, 3. INSURANCE, 8. JUDGMENTS, 6. MANDAMUS, 8. MORTGAGES, 1, 2. PARTITION, 2. PLEADING, 13. RECEIVERS.

1. Submission of error proceeding on merits is waiver of defect of parties. *Curtin v. Atkinson*..... 111
2. Where a plaintiff transfers his interest in the subject of the action to another during the pendency of the cause, the suit may be prosecuted to final termination in the name of the original plaintiff; or the person to whom the transfer is made may be substituted as plaintiff. *Howell v. Alma Milling Co.*..... 80
3. A railroad company which has appropriated private property for right of way purposes, on appeal to the district court from an award of damages, is not entitled to have a third party substituted and made a party in its stead, on the ground that such person has agreed to indemnify it for money expended for right of way. *Omaha S. R. Co. v. Beeson*..... 361
4. In an action against a county treasurer and his bondsmen for a wrongful sale of land it was shown that a person pur-

chased certain lands at tax sale and had the certificates and deeds made to his sister. He testified that he had money belonging to her to invest and that he purchased the property in question. It was sought to impeach this testimony by showing that after the purchase he had made statements that on account of domestic difficulties he had taken the title in the name of his sister. *Held*, That as the money paid purported to be that of the sister and the titles were taken in her name she could maintain such an action. *Alexander v. Overton*..... 593

Partition. See EVIDENCE, 13.

1. A party out of possession of real estate, whose title is denied, cannot maintain an action of partition against one in possession, claiming title to said land. *McMurtry v. Keifer* 529
2. In an action for partition the defendant alleged a partnership between himself and the plaintiff's husband who had conveyed the land to her. The trial court found such partnership to exist and that the plaintiff had no rights in the premises, and that the plaintiff's husband was a necessary party for an accounting. *Held*, That the testimony failed to show a partnership in the land but merely in the stock and improvements, and that the plaintiff could maintain the action subject to the payment of the improvements made by the firm. *Reed v. Snell*..... 814

Partnership. See ACCOUNTING. MASTER AND SERVANT, 1.
PARTITION, 2. REPLEVIN, 12.

In an action by a member of a partnership against the others for an accounting, the finding was in favor of the plaintiff. The testimony showed that one of the defendants had previously conveyed to plaintiff, to satisfy his claim, property which he claimed was worth \$8,000, and by the plaintiff admitted to be of the value of \$2,000. The finding failed to fix the value of this property, or make a deduction therefor. Upon appeal to supreme court, *held*, that plaintiff might reconvey the property within thirty days, and in case he failed to do so, a reference would be ordered to ascertain the value thereof. *Gerber v. Jones*... 126

Party Walls. See COUNTY COURTS. VENDOR AND VENDEE, 7.

Passengers. See CARRIERS, 5, 6.

Paving Streets. See MUNICIPAL CORPORATIONS, 1, 2.

Payment. See NEGOTIABLE INSTRUMENTS, 7.

Personal Injuries. See CARRIERS. MASTER AND SERV-
ANT, 2, 3. MUNICIPAL CORPORATIONS, 7.

Petition. See COUNTY SEAT.

Photograph of Premises. See EVIDENCE, 4.

Physicians and Surgeons. See INDICTMENT AND INFOR-
MATION, 4, 5.

1. In a malpractice case there can be no recovery for expense incurred in efforts to cure an injury, unless it be shown that the expense so incurred was reasonable and necessary. *Hewitt v. Eisenbart*..... 794
2. The law requires of a surgeon in the treatment of his patient the exercise of that degree of knowledge and skill ordinarily possessed by members of the medical profession. *Id.*
3. Testimony as to the physical condition of a plaintiff in a malpractice case just before the trial, and two or more years after undergoing the treatment complained of, is competent where such condition is shown to be the result of the injury in question and is of a permanent nature. *Id.*
4. In a malpractice case it is not necessary to sustain a verdict for the plaintiff, that all the expert witnesses called should consider the treatment pursued by defendant improper; nor will the fact that all such witnesses agree that a portion of such treatment is proper under some circumstances, in itself defeat a recovery. *Id.*

Pleading. See BONDS. CARRIERS, 7. CONTRACTS, 3. EXEC-
UTORS AND ADMINISTRATORS. FRAUDULENT CON-
VEYANCES, 2. INDEMNITY, 1. JUDGMENTS, 6. LIQ-
UORS, 1. QUANTUM MERUIT. SALES, 1. STATUTE OF
LIMITATIONS, 2. TROVER AND CONVERSION.

1. Petition set out in opinion held to state a cause of action in replevin. *McKinney v. First National Bank of Chadron*, 639
2. The petition in an action on a replevin bond, set out in the opinion, held to state a cause of action. *Shoning v. Coburn*, 76
3. The answer discussed in the opinion does not allege sufficient facts to constitute the defense of usury. *Bess v. Munford* 151
4. If from the facts stated in a petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie. *George v. Edney* 604.
5. Where the allegations of a pleading are indefinite, the

- remedy is by motion to have the same made more definite and certain. *First National Bank of Dorchester v. Smith*, 199
6. Where the answer to a petition is a general denial, and it appears from the pleadings themselves that it is false, it may be stricken from the files as sham. *Upton v. Kennedy*, 66
 7. A new cause of action should not be presented in the reply, but where no objection is made it will be *held* to have been waived after submission of case on merits. *Gregory v. Kaaf*..... 533
 8. Where a general denial is sufficient in form and there is nothing on the face of the pleadings to show that it is false, the court will not enter into an examination of the merits of the defense upon affidavits. *Upton v. Kennedy*, 67
 9. Where there is a misjoinder of causes of action which plainly appears on the face of the petition, the adverse party should demur for that cause. If he fails to do so he will waive the defect. *Porter v. Sherman County Banking Co*..... 272
 10. The petition to recover damages from a county for injuries resulting from a failure of the county board to keep a public bridge in repair, set out in the opinion, *held* to state a cause of action. *Hollingsworth v. Saunders County*...142-147
 11. Where the averment that no proceedings have been had at law, for the collection of the debt, has been omitted from a petition to foreclose a mortgage, the objection must be made before rendition of decree. *Henry & Coatsworth Co. v. McCurdy*..... 863
 12. A petition in an action of replevin by a mortgagee of chattels is not objectionable because it fails to allege that the note, for payment of which the mortgage was given to secure, was due, where the date of maturity, which is prior to bringing suit, is set forth. *Rodgers v. Graham*..... 730
 13. After answer day, if a defendant files a pleading, in the nature of a cross-petition, against his co-defendants who have not appeared in the action, such co-defendants can be concluded in respect thereto, only by their appearance, or after the service on them of a notice in the nature of a summons, as to such pleading. *Arnold v. Badger Lumber Co*..... 841
 14. An action was twice reversed in the supreme court. Before the third trial the plaintiff died and the cause was revived in the name of his executrix. To her petition the defendant filed an answer in which the title of the cause was stated as it appeared before the revivor. Sufi-

cient appeared in the answer to show to what petition it applied, and it was in fact filed in the proper case. No motion was made and filed to strike it from the files. *Held*, Error without prejudice. *Williams v. Eikenbary*..... 478

Policies. See INSURANCE.

Possession. See PARTITION, 1. REPLEVIN, 12.

Power of Attorney.

In a power of attorney to convey real property the true function of the description is not necessarily to identify the land, but may be only to furnish the necessary means of identification. If such description can be made complete by an examination of the public records and the records of judicial proceedings clearly indicated in such description, it is a sufficient identification of the subject-matter of such power of attorney. *Connell v. Galligher*..... 750

Practice. See ASSIGNMENTS OF ERROR. BILL OF EXCEPTIONS, 2, 3. DISMISSAL. EVIDENCE, 16. INDICTMENT AND INFORMATION, 2. PLEADING, 5, 11. REMITTITUR.

1. A party desiring to review on error an order allowing costs must file a motion to retax and bring up the ruling thereon. *Bates v. Diamond Crystal Salt Co.*..... 904
2. In an original application for *mandamus* before the supreme court, where a demurrer to the relation was overruled, the defendant was permitted to file an answer in five days. *State v. Spicer*..... 478
3. The action of a county court in setting aside a judgment under sec. 1001 of the Code upon a petition instead of a motion is a mere irregularity, and an order so made is not void for want of jurisdiction. *Pollock v. Boyd*..... 360

Preachers. See RELIGIOUS SOCIETIES.

Preferred Creditors. See VOLUNTARY ASSIGNMENTS, 3, 4.

A debtor in failing circumstances may lawfully prefer one or more of his creditors and secure such creditors by mortgage or conveyance absolute, provided the transaction is in good faith and not made with intent to defraud other creditors. *Costello v. Chamberlain*..... 45

Presumption. See CORPORATIONS 1, 6.

Presumption of Fraud. See FRAUDULENT CONVEYANCES, 3, 5, 8.

Presumption of Negligence. See CARRIERS, 1. RAILROAD COMPANIES, 4.

Presumption of Payment. See **NEGOTIABLE INSTRUMENTS**, 7, 14.

Principal and Agent. See **POWER OF ATTORNEY. REAL ESTATE BROKERS.**

1. A commission cannot be collected by an agent for his services as such if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency. *Jansen v. Williams* 869
2. An agent for the purpose of selling goods will not be permitted to sell to himself, even though the sale be public, and no actual fraud appear. In case he do so, he will be required to account to his principals for any profit he may have realized. *Rockford Watch Co. v. Mansfield* 802
3. An agent is required to disclose to his principal all the information he has touching the subject-matter of the agency; and his relation to his principal forbids his becoming a purchaser thereof for his own benefit in any way without the full knowledge by the principal of this fact, and the principal's acquiescence therein with such knowledge. The burden of proving such knowledge and acquiescence is upon the agent. *Jansen v. Williams* 869

Principal and Surety. See **HUSBAND AND WIFE. SUBROGATION.**

1. An undertaking will be strictly construed in favor of sureties, and their liability will not be extended by construction beyond their specific agreement. *Curtis v. Atkinson* 110
2. The mere continuance of a cause in an appellate court by stipulation of the parties, without the consent of the surety on the appeal bond, will not operate to discharge such surety. *Howell v. Alma Milling Co.* 80
3. In the absence of proof of fraud or collusion between the principal and the creditor, a stipulation in the appellate court for judgment, without the knowledge or consent of the surety, will not release the surety on an appeal bond from liability thereon. *Id.*

Priority. See **CHATTEL MORTGAGES**, 6, 7. **MECHANICS' LIENS**, 3.

Private Banks. See **CORPORATIONS**, 4, 5, 8.

Probate of Wills. See **WILLS.**

Proceedings in Error. See **ERROR PROCEEDINGS. REVIEW.**

Promissory Notes. See **MORTGAGES**, 1, 2. **NEGOTIABLE INSTRUMENTS. SUBROGATION.**

Proof of Loss. See INSURANCE, 3.

Proof of Publication. See GUARDIAN AND WARD.

Property Rights. See RELIGIOUS SOCIETIES.

Protest. See NEGOTIABLE INSTRUMENTS, 9, 11.

Public Highways. See HIGHWAYS.

Public Improvements. See DAMAGES, 2.

Public Money. See LEGISLATIVE APPROPRIATIONS.

Public Property. See MUNICIPAL CORPORATIONS, 1, 3.

Publication. See CORPORATIONS, 3, 4. GUARDIAN AND WARD. LIQUORS, 7, 8.

Qualification. See OFFICE AND OFFICERS, 3.

Quantum Meruit.

Allegations of value in a pleading are not to be taken as true by a failure to deny them; and in all cases founded upon a *quantum meruit*, where the value of the services is not expressly admitted, the question of value is in issue and must be proved and submitted to the jury. *Campbell v. Brosius* 792

Question for Jury. See NEGLIGENCE.

Quia Timet. See QUIETING TITLE.

Quieting Title. See EQUITY.

In an action to set aside a deed as a forgery the plaintiff testified that she did not execute the deed. The original deed and plaintiff's signature admitted to be genuine were introduced in evidence. A number of experts were called, compared the signatures and pronounced the one on the deed genuine. In addition to this testimony there was the certificate of the notary before whom the deed purports to have been acknowledged. In a trial upon the record in the supreme court the genuine signature and alleged forgery were examined with a good microscope, without detection of forgery. *Held*, That a finding for the defendant was sustained by the evidence. *Barker v. Avery* 599

Railroad Companies. See CARRIERS. EMINENT DOMAIN, 2. INJUNCTION, 4.

1. Petition to recover value of stock injured and killed on track by negligence of the company in maintaining gateway at farm crossing, set out in opinion, *held* to state a cause of action. *Fremont, E. & M. V. R. Co. v. Pounder* ... 247

2. In an action to recover damages for loss occasioned by railway fires it devolves on the plaintiff to prove by a preponderance of the evidence that the fire was communicated by sparks or cinders from the railway engines. *Union P. R. Co. v. Keller*..... 189
3. It need not be proved that any particular engine was at fault, but it will be sufficient if it is proved that the fire was set by any engine passing over the defendant's railway, and the evidence may be wholly circumstantial, as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines, and, second, facts tending to show that it probably originated from that cause and no other. *Id.*
4. Where the proof shows that a fire originated from an engine running over the defendant's railway, it is unnecessary for the plaintiff to show affirmatively any defect in the construction or condition of the engine, or any negligence in its management. Negligence will be presumed from the fact that fires were set out. *Id.*
5. Under the statute, where a railway has been in operation in any county of the state for six months, it is its duty to erect and maintain on the sides of its road, except at crossings of public roads and within the limits of cities and villages, suitable and amply sufficient fences to prevent stock from getting on the railroad. Gates at farm crossings are a part of the inclosure of the railroad and must be suitable and amply sufficient to prevent stock from getting on the track. *Fremont, E. & M. V. R. Co. v. Pounder*..... 247
6. On the trial of an action to recover for injury to plaintiff's horses which the evidence showed had escaped through a gateway where a fence and gate had been negligently constructed and maintained by the company along plaintiff's land, and that the stock was injured on the track, it was held proper to instruct the jury as follows: "If you find from the evidence that defendant, when it fenced its road through plaintiff's land, put in a gate, but so negligently and carelessly kept up and maintained such gateway across its right of way that plaintiff's horses passed through such gateway upon said defendant's right of way and railroad and were killed or injured in consequence thereof, then you should find for plaintiff." *Id.*..... 252
7. In such a case the court did not err in refusing to instruct the jury that the company was not liable unless the injury was caused by actual collision with defendant's locomotive, engine, or trains. *Id.*

Rape.

1. Instructions to jury, set out in opinion, approved. *Richards v. State* 23-26
2. Where accused admits sexual intercourse but denies use of force, jury must find the fact. *Id.*..... 17
3. Proof of deformity of prosecutrix, as by want of a hand, is proper as tending to show diminished power of resistance. *Id.*
4. Where complaint is not made till seven months, when concealment, by reason of pregnancy, is no longer possible, the statements of the prosecutrix are not admissible; but independent facts, as the condition of her clothing, are admissible. *Id.*
5. Charge made months after commission of crime, where there are no marks of violence on person or clothing, or evidence of excitement or change in demeanor, cannot be sustained without very strong corroborating proof of the commission of the crime. *Id.*

Ratification.

Bates v. Diamond Crystal Salt Co...... 904

Real Estate Brokers. See POWER OF ATTORNEY. PRINCIPAL AND AGENT, 1, 3.

When a real estate broker is employed to procure a purchaser of real property, he is entitled to compensation when he has secured a proposed purchaser ready, able, and willing to buy the property on the terms and conditions upon which the said broker was authorized to procure such purchaser. This right to compensation will not be impaired by the subsequent inability or unwillingness of the owner to consummate such sale on the terms prescribed. *Jones v. Stevens*..... 849

Receipt.

A written receipt may be contradicted or explained by parol testimony. *Morse v. Rice* 212

Receivers. See BANKS AND BANKING, 2.

A receiver appointed by a court of record of another state to take charge of the business of a partnership there and wind up its affairs may take charge of the property of the firm in this state, but in such a case there is a mere substitution of parties and the receiver has no greater rights in such property than the parties themselves. *Ogden v. Warren* 715

Recitals. See EVIDENCE, 13.

Record for Appeal. See **APPEAL**, 3.

Redemption. See **TAX LIENS**, 1.

Registration. See **FRAUDULENT CONVEYANCES**, 9-12.

The proper registration of a party wall agreement is constructive notice to all purchasers of the real estate affected by the agreement; and such notice is as effectual and binding as actual notice. *Garmire v. Wully*..... 340

Religious Societies.

1. The proceeding set out and discussed in the opinion, whereby it was sought to exclude a preacher from his clerical functions, examined and *held* not to be in accordance with the procedure established by the church discipline of the Evangelical Association of North America. *Pounder v. Ashe*..... 584
2. When rights of property are in question, civil courts will inquire whether or not the organic rules and forms of proceedings prescribed by the ecclesiastical body have been followed. *Id.*
3. When tested by such organic rules and forms, it is found that the proceedings of an ecclesiastical tribunal were without jurisdiction, such proceedings will be held void in so far as such proceedings necessarily and directly involve property rights. *Id.*

Relocation. See **COUNTY SEAT**.

Remittitur. See **REVIEW**, 6.

In a malpractice case against a physician the plaintiff was permitted to testify over defendant's objection that his expenses for medicine and treatment in efforts to be cured were about \$85. It was not shown that the expenses were reasonable and necessary. Otherwise the proceedings were without error. *Held*, That a judgment in favor of plaintiff would be reversed in case he failed to file a remittitur for said sum in thirty days. *Hewitt v. Eisenbart*..... 801

Remonstrance. See **LIQUORS**, 6-8.

Repeal by Implication. See **STATUTES**, 2, 3.

Replevin. See **ATTACHMENT**, 6. **FRAUDULENT CONVEYANCES**, 4. **PLEADING**, 12. **RES ADJUDICATA**. **SALES**, 2, 3. **VOLUNTARY ASSIGNMENTS**, 1.

1. Action on bond. *Shoning v. Coburn*..... 76
2. Instruction set out in opinion approved. *Hakanson v. Brodke*..... 42
3. Petition set out in opinion *held* to state a cause of action in replevin. *McKinney v. First National Bank of Chadron*, 620

4. Where a defendant lawfully in possession of property denies the title and right of possession of the owner, no demand is necessary. *Ogden v. Warren*..... 715
5. Mortgagee of chattels in possession is entitled to hold same as against an officer holding a writ of attachment that runs against his mortgagor. *Hakanson v. Brodke*..... 42
6. Replevin of personal property from officer holding on an execution does not divest the lien of the levy where the claimant in the replevin suit fails to maintain title. *Bowman v. First National Bank of Nelson*..... 117
7. The petition by mortgagee of chattels, in action of replevin need not allege specifically that the note, to secure payment of which the mortgage was given, is due, where the date of maturity, which is prior to bringing suit, is stated. *Rodgers v. Graham*..... 730
8. Where, in an action by a mortgagee against the mortgagor to recover the mortgaged chattels, it is established that the mortgage was given to secure a usurious loan of money, the defendant is entitled to recover costs, although the verdict is in favor of the plaintiff. *Id.*
9. When the defendant in an action of replevin contests the case in the trial court on the merits, wholly on an affirmative claim of ownership and right of possession of the property in himself, no proof of demand and refusal is necessary to entitle the plaintiff to recover costs in case the verdict is in his favor. *Id.*
10. Where corn in a single pile or crib owned by two tenants in common is in the exclusive possession of one of such owners, but both being equally entitled to the possession thereof, the other joint owner, if his co-tenant refuses a division when properly demanded, may recover his portion of the grain by an action of replevin. *Fines v. Bolin*, 621
11. Where a merchant in failing circumstances, intending to prefer certain creditors, executed a bill of sale, the vendee paying the preferred claims out of the consideration named in the bill of sale it was held, in an action of replevin by the vendee against the sheriff who had seized the goods on an order of attachment in favor of an unsecured creditor, that the transfer was not an assignment for benefit of creditors, that the vendee was the only person beneficially interested, and that the transfer was valid, regardless of whether the bill of sale was intended as a mortgage or an absolute transfer. *Costello v. Chamberlain*..... 45
12. Two firms entered into a contract to deal in corn. The

parties of the first part were to furnish the money and the parties of the second part were to buy the corn, place it in cribs, insure it, and incur all lawful expenses of buying, cribbing, shelling, and preparing for market. The corn was to be the property of parties of the first part and at all times under their control. The profits above the actual cost of the corn and expenses were to be equally divided. A large quantity of corn was purchased under this agreement, and while it was in the cribs the partnership of which the parties of the second part was composed was dissolved by an order of court, and a receiver appointed, who took possession of the corn. In an action of replevin by the parties of the first part, *held* that they had a lien upon the corn for the purchase money and half the profits, and were entitled to immediate possession. *Ogden v. Warren*..... 715

Replevin Bonds. See SHERIFFS AND CONSTABLES.

Representative District.

The twentieth district includes the territory now comprising Boyd county. *State v. Van Camp*..... 91

Res Adjudicata. See MORTGAGES, 2.

1. *Richards v. McMillin*..... 353
2. A judgment of dismissal in an action of replevin entered because the plaintiff has no legal capacity to sue will not bar a future action for the same property. *Rodgers v. Levy*, 601
3. Where a cause is dismissed because the plaintiff has not legal capacity to sue, and the defendant thereupon has a jury impaneled to try the right of property which is awarded to him, he thereby cannot bar the plaintiff from maintaining a second action of replevin for the same goods. *Id.*

Rescission. See INFANTS. SALES, 2-4.

Resolutions. See MUNICIPAL CORPORATIONS, 4, 5.

Revenue. See TAX SALES.

Reversion. See HIGHWAYS.

Review. See ACCOUNTING. APPEAL, 1. ASSIGNMENTS OF ERROR. BILL OF EXCEPTIONS. BONDS. CARRIERS, 7. CRIMINAL LAW, 7. ERROR PROCEEDINGS. HABEAS CORPUS. INSTRUCTIONS, 8. NEGOTIABLE INSTRUMENTS, 13. NEW TRIAL, 3, 4. PARTITION, 2. PRACTICE, 3. RELIGIOUS SOCIETIES. REMITTITUR. TRIAL, 4.

1. Evidence *held* to sustain the verdict. *Cortelyou v. Hiatt*... 584
- Costello v. Chamberlain* 45

<i>Garmire v. Willy</i>	340
<i>Morse v. Rice</i>	212
<i>Union P. R. Co. v. Keller</i>	190
<i>Williams v. Eikenbary</i>	479
2. Evidence held insufficient to sustain the judgment. <i>Ashford v. State</i>	38
<i>Bloomer v. Nolan</i>	51
3. Where from an examination of the evidence it is apparent that the verdict is wrong, it will be set aside. <i>Richards v. McMillin</i>	352
<i>Wood River Bank v. Dodge</i>	708
4. Where the testimony is conflicting and the verdict not against the clear weight of evidence the judgment will be affirmed. <i>Metropolitan Building & Loan Association v. Van Pell</i>	3
<i>Wyeth Hardware & Manufacturing Co. v. Shearer</i>	5
5. Where a case is submitted under proper instructions, and the verdict conforms to the proof, the judgment will be affirmed. <i>City of Grand Island v. Oberschulte</i>	696
<i>Kansas Manufacturing Co. v. Lumry</i>	123
6. Where verdict is excessive the judgment will be reversed unless a remittitur is filed. <i>Van Etten v. Selden</i>	210
7. Order overruling plea in abatement cannot be reviewed in supreme court until after final judgment. <i>Gartner v. State</i> , 280	
8. A judgment will not be reversed for want of evidence unless the burden of proof is plainly opposed to it. <i>Flanagan v. Edwards</i>	360
9. Affidavits used on the hearing of a motion in the district court cannot be considered in the supreme court unless embodied in a bill of exceptions. <i>Maggard v. Van Dusen</i> , 862	
10. Affidavits used in support of a motion for a continuance in the district court, to be available in the appellate court, must be made a part of the record by a bill of exceptions. <i>Barton v. McKay</i>	632
11. Where counter-affidavits have been used on a motion for continuance, and the continuance is denied, the judgment will not be reversed for that reason, where the showing of the party making the application, when considered alone, is insufficient to entitle him to a continuance. <i>Id.</i>	633
12. Where an order discharging an attachment is against the clear weight of evidence, it will be reversed and the attachment sustained. <i>Jones v. Bivin</i>	821
13. Where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard	

- upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence. *Whipple v. Hill* 720
14. Evidence held sufficient to sustain a finding and judgment foreclosing a mechanic's lien. *Gregory v. Kaar*..... 533
 15. In case stated evidence found to sustain finding and decree of trial court. *Sprague v. Fuller* 220
 16. Evidence discussed in opinion held not sufficient to sustain an order for an allowance to widow out of decedent's estate. *Sheedy v. Sheedy*..... 373
 17. The evidence being in writing and practically undisputed as to the amount due the plaintiff, a verdict for a sum greatly less cannot be sustained. *Porter v. Sherman County Banking Co.*..... 271
 18. Where the principal error relied upon is that the verdict is against the weight of evidence the verdict will not be set aside, unless it is clearly wrong. *Clapham v. Storm* ... 490
 19. Upon the main issues in the pleadings the findings and judgment in an action by a partner for an accounting in case discussed in opinion are sustained by the evidence. *Gerber v. Jones*..... 126
 20. Where a bill of exceptions has been quashed and the court below correctly applied the law to the facts found by a referee, that being the only question for review, the judgment will be affirmed. *Brown v. Farmers & Merchants Banking Co.*..... 420
 21. In an action on a note, where the preponderance of evidence shows that the plaintiff is a *bona fide* holder and entitled to recover, a judgment for the defendant will be reversed. *Reuber v. Crawford*..... 334
 22. Upon conflicting evidence in a case involving only the question whether or not, justifiably relying upon the representations of plaintiff's agent as to the contents of a written contract, the defendants signed the same, and whether or not said representations were false, the verdict of the jury in favor of the defendants will not be disturbed. *Aultman v. Finck*..... 680
 23. When it is sought to review a decree in equity by error proceedings, and the only error alleged is that the pleadings do not support the decree, every reasonable presumption must be indulged in support of the correctness of the decree; and unless it certainly appears that no such decree as rendered could lawfully be pronounced on the pleadings, it will not be disturbed. *Fitzgerald v. Brandt*, 684

24. In order to review the proceedings in the trial of an equity case by a petition in error, a motion for a new trial must be filed, as in an action at law. *Gray v. Dishrov*..... 557
25. The supreme court will not review the proceedings of the district court by petition in error, unless a motion for a new trial was made in the trial court and a ruling obtained thereon. *Jones v. Hayes*..... 526
26. Unless a motion for a new trial is made within three days after the verdict or decision, the supreme court cannot examine any of the errors which it is alleged occurred at the trial. *Fitzgerald v. Brandt*..... 683
27. The supreme court will not review the instructions given to the jury by the court below, nor those asked and refused, where its attention has not been called to them in the motion for a new trial. *Barton v. McKay*..... 633
28. The failure of a jury, in assessing the amount of recovery, to allow interest upon a sum due upon contract is not presented for review by the assignment, in a motion for a new trial, that the verdict is not supported by sufficient evidence. *Riverside Coal Co. v. Holmes* 858
29. The statutory assignment, in a motion for a new trial, of "errors of law occurring at the trial and duly excepted to," is sufficient to present for review the ruling of the court upon a demurrer *ore tenus* interposed before the introduction of any evidence. *Id.*
30. A judgment containing a finding that a temporary injunction was properly allowed will not be reversed where such finding does not prejudicially affect the rights of the party complaining, and the judgment is otherwise correct. *Westover v. Lewis* 692
31. A court of equity will not enjoin the collection of a judgment at law on account of mere irregularities or errors on the part of the trial court. Errors at the trial or in the proceedings must be corrected in the trial court or by direct proceeding in the appellate court. *Pollock v. Boyd*... 369
32. In superintending the impaneling of a jury some discretion is necessarily confided to the court, and the excusing of a juror for cause will not be held ground for reversal, unless there appears to have been an abuse of discretion. *Omaha S. R. Co. v. Beeson*..... 361
33. Where the proof on the essential facts in the case is practically undisputed and the verdict conforms to the proof, the verdict will not be set aside even if some of the instructions are not entirely accurate. *First National Bank of Denver v. Scott*..... 607

34. The giving of the instructions in an action involving the rescission of a sale, set out at length in the opinion, is not reversible error, since the verdict of the jury is the only one which should have been rendered under the testimony. *Babcock v. Purcupile* 417
35. The finding of a court, in a case tried without the intervention of a jury, has the same force as a verdict and will not be disturbed where the evidence is conflicting. *Westover v. Lewis* 692
36. In a cause tried to the court without a jury, in order to raise objection in supreme court that no waiver of jury is shown it must appear that the objection was made and overruled in trial court; objection made for first time in supreme court is unavailing. *Shoning v. Coburn* 76
37. In an action to revive a judgment where a demurrer to the answer has been sustained and judgment rendered, the remedy is by proceeding in error. The judgment will not be enjoined upon the same grounds set forth in the answer. *Haynes v. Aultman* 257
38. A new cause of action should not be presented in the reply, but when no objection is made on that ground in the district court and the issues presented are submitted on their merits, the objection that the cause of action was first stated in the reply will be held to have been waived. *Gregory v. Kaar* 533
39. It is not prejudicial error to permit an expert to state what steps he would take in a given case if the question does not refer to any matter in dispute but is merely introductory in its character. *Hewitt v. Eisenbart*..... 794
40. On the cross-examination of a witness the same question was repeated several times, whereupon the court said "if you ask another question of that kind I will stop the cross-examination of this witness." No exception was taken and it was held that the statement could not be reviewed. *Jones v. Stevens* 852
41. A judgment will not be set aside because an expert witness was permitted to answer a hypothetical question assuming a fact unsupported by the evidence, where such fact was the only hypothesis of the question, not combined with others based upon evidence, and the answer could not mislead the jury. *Hewitt v. Eisenbart*..... 794
42. The rulings of the trial court in not permitting the defendant to answer certain questions propounded to him by his counsel on direct examination cannot be reviewed by the supreme court, where no offer was made in the trial

- court to prove the facts which the party complaining assumes the questions would have elicited. *Barton v. McKay* 633
43. An order allowing costs against a party can only be reviewed on error in the supreme court after a motion to retax has been filed and a ruling obtained thereon. *Bates v. Diamond Crystal Salt Co.*..... 904
- Revivor.** See EXECUTORS AND ADMINISTRATORS. JUDGMENTS, 8.
- Right of Way.** See EMINENT DOMAIN.
- Salaries.** See COUNTIES, 1. COUNTY CLERKS.
- Sales.** See CHATTEL MORTGAGES, 6, 8. CONFUSION OF GOODS. GUARDIAN AND WARD. PARTIES, 4. PRINCIPAL AND AGENT, 2. TAX SALES. VENDOR AND VENDEE.
1. In an action for damages for refusing to deliver goods in pursuance of a contract of sale, where no consequential damages are claimed, it is not necessary to allege the market value of the goods. *Riverside Coal Co. v. Holmes*, 858
 2. Where goods are sold upon credit induced by the fraudulent representations of the vendee as to his solvency, or ability to pay for the goods bought, the vendor may rescind the sale upon the discovery of the fraud and replevy the goods. *McKinney v. First National Bank of Chadron*, 629
 3. Where goods were sold to be paid for on delivery, either in cash or secured note payable in thirty days, but the purchaser fraudulently managed to obtain possession of the property without complying with the conditions, the purchaser was insolvent and mortgaged the property in question to secure pre-existing debts, *held*, that the seller, upon discovery of the fraud, could rescind the sale and reclaim the goods from the mortgagee. *Henry v. Vliet*..... 138
 4. A sale and delivery were made of eleven cases of eggs. It was claimed by the seller that the sale was unconditional, and by the buyer that the sale was upon condition that he be allowed to apply purchase price to payment of an account due him from a third person. The seller subsequently refused to allow such application of purchase money. The purchaser having resold part of the eggs, shipped the remainder to the seller and paid for the part used. In an action to recover the value of the eggs, *held*, that the buyer could not rescind the contract, and that the seller was entitled to recover the unpaid price. *Babcock v. Purcupile*417-421

5. The owner of a mill executed a bill of sale to a bank on a large quantity of flour, feed, and other property in the mill. Prior to the execution of the bill of sale the mill owner had ordered several cars of wheat from a warehouseman in another county, and one car so ordered was shipped one day after the execution of the bill of sale and two days thereafter received at the mill and a portion or all ground into flour and mixed with the stock in the mill. *Held*, That in no event did the bill of sale cover that wheat, and the person who claimed to be the owner of the mill was liable for the value of the wheat. *First National Bank of Denver v. Scott* 607

Schools and School Districts.

- South Omaha is a city of the second class. Its school board on the 6th day of June, 1892, made an estimate of the amount of school tax to be levied in said city for that year. This estimate was imperfect in its statements and details. The county commissioners held the same until July 14, 1892, when they refused to levy the tax. Afterwards proceedings in *mandamus* were instituted and the court rendered judgment in their favor. Corrected estimates were then filed. *Held*, That such estimates related back to June 6 and that it was the duty of the commissioners to levy the tax. *State v. Paddock*..... 263

Seal. See DEEDS, 2.

Servant. See MASTER AND SERVANT.

Service. See JUDGMENTS, 2, 8. SUMMONS, 2, 5.

Settlement. See COMPROMISE.

Sham Pleadings. See PLEADING, 6.

Sheriffs and Constables. See ATTACHMENT, 3, 6. EXECUTIONS. INDEMNITY.

- At common law an officer was liable for the sufficiency of the sureties on a replevin bond; but under sec. 189 of the Code he is liable after twenty-four hours only where the defendant in replevin has excepted to the sufficiency of the sureties, and they or new sureties have failed to justify. *Thomas v. Edgerton*..... 254

Sidewalks. See MUNICIPAL CORPORATIONS, 7.

Skill. See PHYSICIANS AND SURGEONS, 2.

Solemnization. See NEW TRIAL, 5.

South Omaha.

- Is city of second class. *State v. Paddock*..... 263

Special Appearance. See JUDGMENTS, 5.

Special Assessments. See MUNICIPAL CORPORATIONS, 1, 3.

Specific Performance.

1. Is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court. *Clarke v. Koenig*..... 572
2. He who asks a court of equity to specifically enforce what he claims are his rights under a contract must not himself be in default in his promises in the same contract. *Id.*
3. A party invoking the equity powers of a court to enforce specific performance of a contract, which he claims is for the sale to him of real estate, must exhibit a contract unambiguous and certain. *Id.*
4. A person purchased certain real estate and in pursuance of the contract entered into possession of the property and made improvements thereon. It was stipulated that time should be of the essence of the contract. *Held*, That his failure to perform at the day fixed would not prevent the specific performance of the contract. *Morvian v. Goodlett*, 394

State. See LEGISLATIVE APPROPRIATIONS.

State Board of Health.

- Act creating, *held* to be within the power of the legislature, and in its general scope not in conflict with the constitution.
See We v. State..... 241

State University. See LEGISLATIVE APPROPRIATIONS.

Statute of Frauds.

1. A memorandum of an agreement in the form of a receipt which describes the land sold, the price and time of payment, with an admission of a receipt of \$25 on the contract, and duly signed by the vendors, is sufficient under the statute. *Gardels v. Klok*..... 493
2. Prior to the statute of frauds a parol contract for the sale of land with delivery of possession was valid. The statute has merely changed the common law so that it is only necessary for the party to be charged to sign the memorandum. The vendee accepting the same is bound as at common law. *Id.*

Statute of Limitations. See FRAUDULENT CONVEYANCES, 9-12. MECHANICS' LIENS, 4.

1. The limitation of two years within which suit may be brought against a national bank under Rev. Stats. U. S., sec. 5198, for taking usurious interest begins to run from the time when the usurious interest is paid. *First National Bank of Dorchester v. Smith*..... 199

2. In pleading the statute of limitations of a foreign state it is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on. The petition set out in the opinion *held* to state a cause of action. *Minneapolis Harvester Works v. Smith* 617
3. In December, 1881, the defendant, a resident of the state of Iowa, gave the plaintiff his promissory note due January 1, 1884, and payable in that state. He removed to Nebraska in 1898, and suit was commenced on the note in this state on July 13, 1891. *Held*, The action was not barred. *Id.* 616
4. An action to foreclose a mortgage is barred in ten years from the time the debt becomes due, or from the date of the last payment or a new promise to pay the same, and under sec. 17 of the Code the time is not extended by the absence of the defendant from the state. *Merriam v. Goodlett* 384
5. Where a person is a resident of another state when a cause of action accrued against him, and afterwards, but before the debt has become barred by the statute of such state, he becomes a resident of Nebraska, statute of limitations will commence to run in his favor here from the date of his coming into the state, and not before. *Minneapolis Harvester Works v. Smith* 616
6. Under sec. 12 of the Code an action for relief on the ground of fraud can only be commenced within four years after the discovery of the facts constituting the fraud. *Gillespie v. Cooper* 775
7. The cause of action mentioned in above section is the fraudulent act complained of and accrues when discovered. It is discovered when the party seeking relief is in possession of sufficient facts to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to a discovery of the fraud. The statute begins to run against a creditor from the discovery of the fraudulent act on the part of his debtor, whether the creditor's claim has been reduced to judgment or not, as he is not limited to a creditor's bill in order to obtain relief on the ground of fraud, but may attach the property fraudulently conveyed. *Id.*

Statutes. See LEGISLATIVE APPROPRIATIONS. STATE BOARD OF HEALTH. TABLE, *ante*, p. xliii.

1. The governor is a part of the law-making power of the

state, and every bill, before it becomes a law, even if passed by a two-thirds majority of each house, must be approved by him, passed over his veto, or remain in his hands more than five days, Sundays excepted. *State v.*

Crouse 835

2. The act of March 30, 1887, entitled "An action to amend secs. 27 and 58, and to add subds. 55 and 59 to sec. 52, art. 2, ch. 14, Comp. Stats., relating to cities of the second class having over 5,000 inhabitants," etc., is a complete act covering the entire subject of the power of the class of cities designated with respect to the opening and improving of streets and alleys, and by implication repeals all prior acts in conflict therewith. *Von Steen v. City of Beatrice*..... 421

3. The provision of subd. 4 of sec. 52, art. 2, ch. 14, Comp. Stats., for the paving of streets in cities of the second class having over 5,000 and less than 25,000 inhabitants, without petition of the owners of property to be charged therefor, is in conflict with the provisions of the act of March 30, 1887, and is repealed thereby. *Id.*

Statutory Construction.

The constitution and election laws contemplate that every qualified elector shall be entitled to vote for state and county officers at each election; and a construction will not be adopted that will have the effect to disfranchise a considerable number of voters, and deprive a county of representation in the legislature, unless rendered necessary by express, unequivocal language. *State v. Van Camp*.... 91

Stipulation. See COMPROMISE.

Stock. See CORPORATIONS, 8.

Stockholders. See CORPORATIONS.

Street Railways. See CARRIERS. MASTER AND SERVANT, 2, 3.

1. Are common carriers of passengers, and are liable as other common carriers upon common law principles. *Spellman v. Lincoln Rapid Transit Co.*..... 890
2. A street railway should keep tickets for sale upon the cars where it transacts its business with the public. *Sternberg v. State*..... 307
3. The street railway of the city of Lincoln is so far under the control of the municipality that the latter may fix the rates of fare for passage over said railway, and may require tickets, six for twenty-five cents, to be kept for sale by each conductor of a car. *Id.*

Streets. See MUNICIPAL CORPORATIONS, 3, 7, 8.

Subrogation.

A person mortgaged her separate estate to secure loans from a bank in favor of a private corporation. It was agreed that as each loan was effected the corporation should deposit notes held by it as collateral security for the loan, the security given by it to be merely contingent. A large number of loans were made in this way and notes as collateral deposited with the bank. Afterwards the bank required her to pay the amount due to it. This she did by mortgaging her separate estate, and she thereupon received from the bank the collateral notes. *Held*, That the testimony clearly established the fact that the notes were held by the bank in good faith before due to secure a loan and debt, and that as she had paid the same as surety, she was subrogated to the rights of the bank. *Guthrie v. Ray*..... 612

Substitution. See PARTIES, 2, 3. RECEIVERS.

Summons. See JUDGMENTS, 8. PLEADING, 13.

1. A mistake in the title of an affidavit for service by publication is immaterial after judgment. *Majors v. Edwards*... 56
2. The filing of a motion to set aside a default is a waiver of all defects and irregularities in the service of the summons. *McCormick Harvesting Machine Co. v. Schneider*..... 206
3. To impeach the return of an officer of the due service by him of a summons the evidence must be clear and satisfactory. *Connell v. Galligher* 749
4. Issued before the expiration of two years from the filing of a mechanic's lien may be served afterward within the statutory time. *Burlingim v. Cooper*..... 73
5. An affidavit, in an action for the foreclosure of a mortgage on real estate, for service by publication, will not be held insufficient, after decree, unless there is an entire omission to state the material facts showing a right to make service by publication. *Majors v. Edwards*..... 56

Sunday. See HOLIDAYS.

Supreme Court.

An interpretation given to a statutory or constitutional provision by the court of last resort becomes a standard to be applied in all cases, and is binding upon all departments of the government, including the legislature. *State v. Van Camp*..... 91

Sureties. See BONDS. PRINCIPAL AND SURETY. SHERIFFS AND CONSTABLES.

Surface Water. See INJUNCTION, 3.

Surgeons. See PHYSICIANS AND SURGEONS.

Talesmen. See JURY, 3.

Tax Liens.

1. On foreclosure, if the parties affected are not before the court, the remedy is an action to redeem. If the court had jurisdiction the decree cannot be treated as void.
Merriam v. Goodlett..... 384
2. A tax lien on the land itself takes precedence of all other liens, and a decree foreclosing the same, and a sale thereunder, where all persons affected thereby are before the court, transfers to the purchaser under the decree an absolute title in fee to the land. *Id.*

Tax Sales. See MANDAMUS, 8. PARTIES, 4.

1. It is the policy of the law to encourage competition at the sale of property for delinquent taxes. *State v. Farney*..... 537
2. The provision of the revenue law for the keeping open of the public sale of lands for delinquent taxes is mandatory, and a substantial compliance therewith is demanded of the officer conducting such sale. *Id.*
3. Where the public sale for delinquent taxes was opened at nine o'clock A. M., and adjourned *sine die* at the expiration of an hour and a half thereafter, the property all remaining unsold for want of bidders, and the treasurer in charge thereof refused to entertain bids for the property advertised which were tendered at three o'clock P. M. of the same day, held not a compliance with the statute which requires the sale to be kept open from nine o'clock A. M. until four o'clock P. M. *Id.*

Taxes. See INJUNCTION, 4. MUNICIPAL CORPORATIONS, 1. SCHOOLS AND SCHOOL DISTRICTS. TAX LIENS. TAX SALES.

Tenants in Common. See REPLEVIN, 10.

Testators. See WILLS.

Testimony. See JURY, 1, 2.

Tickets. See STREET RAILWAYS, 3.

Time. See APPEAL, 2.

Time Essence of Contract. See SPECIFIC PERFORMANCE, 4.

Title. See INSURANCE, 4.

Title to Office. See COUNTIES, 5. MANDAMUS, 7.

Titles. See TAX LIENS.

Torts. See MUNICIPAL CORPORATIONS, 7. PHYSICIANS AND SURGEONS.

A person injured by the failure of a county board to keep a public bridge in repair may maintain an original action for damages against the county in any court of competent jurisdiction. He is not required to present his claim to the county board for allowance or rejection. *Hollingsworth v. Saunders County*..... 147

Traffic. See LIQUORS, 4, 5.

Transcript. See APPEAL, 3, 4.

Treasurers. See COUNTIES, 1. PARTIES, 4. TAX SALES.

Trespass. See EMINENT DOMAIN, 1.

Trial. See ASSIGNMENTS. BONDS. CRIMINAL LAW, 6, 7. DISMISSAL. EVIDENCE, 14, 16. EXECUTORS AND ADMINISTRATORS. FORCIBLE ENTRY AND DETAINER. FRAUDULENT CONVEYANCES, 5, 8. INSTRUCTIONS. JURY TRIAL. MALICIOUS PROSECUTION, 2. MUNICIPAL CORPORATIONS, 6, 7. NEGLIGENCE. NEGOTIABLE INSTRUMENTS, 14, 17. NEW TRIAL. QUANTUM MERUIT. RAILROAD COMPANIES, 6, 7. REVIEW, 35. WITNESSES, 2.

1. Refusal of court to direct verdict, *Acid*, proper. *Hakanson v. Brodke*..... 42
2. Where it is necessary for the plaintiff to introduce any evidence in order to maintain his action he is entitled to open and close. *Cortelgou v. Hiatt*..... 584
3. Trial by jury should be claimed in lower court before error can be predicated in supreme court on fact of a cause being tried to court without jury. *Shoning v. Coburn*..... 76
4. Where a witness volunteers testimony not responsive to any questions, and which is immaterial under the issues, the complaining party should object thereto or move to strike it out of the record. A new trial will not be allowed on account of such volunteer evidence when no objection is made to it at the time of the trial. *Omaha S. R. Co. v. Benson*..... 362

Trover and Conversion.

1. In the trial of an action for the conversion of a note the purpose for which the note was assigned may be proved to show the nature of the transaction. *Cortelgou v. Hiatt*..... 584
2. The evidence, discussed in the opinion in an action against

a sheriff for the conversion of a stock of goods seized on writs of attachment, *held* sufficient to sustain a verdict in favor of the plaintiff. *Barton v. McKay*..... 633

3. The allegations in a petition that plaintiff was the owner and in the possession of a note and assigned the same as collateral security for a certain debt, and that defendants wrongfully sold the same and converted the proceeds to their own use, are sufficient. *Cortelyou v. Hiatt*..... 584

Trust Funds. See BANKS AND BANKING, 2. MANDAMUS, 9. VOLUNTARY ASSIGNMENTS, 3, 5.

Ultra Vires. See CORPORATIONS, 1, 2.

Usury. See EVIDENCE, 16. REPLEVIN, 8. STATUTE OF LIMITATIONS, 1.

1. An agreement to pay annually in advance the highest legal rate of interest for the use of money does not make the contract usurious. *Ross v. Munford*..... 148
2. Where a party loans money at the maximum rate allowed by statute and coupon notes are taken for the interest, which stipulate that interest shall be allowed thereon after maturity, at ten per cent, the contract is not thereby tainted with the vice of usury. In such case no interest will be allowed on such coupons. *Id.*
3. Where a loan was made at the highest legal rate of interest, the fact that the money was not turned over until after the interest began to run does not make the contract usurious, where the delay was caused by a failure of the borrower to procure, according to agreement, releases of prior incumbrances upon the property which was to secure the loan. *Id.*..... 153
4. In an action on a note the evidence showed that the money was actually loaned by the plaintiff in good faith for the purpose of paying defendant's note at a bank and that the money was so applied. *Held*, That the fact plaintiff was a director in the bank and loaned defendant the money to pay his usurious debt to the bank, which was known by plaintiff at the time to be usurious, is not alone sufficient to authorize the defendant to set up as a defense to such action the usurious transaction between himself and the bank. *Yeiser v. Fulton*..... 521
5. In such a case it was admitted by the plaintiff that he had received \$11.25 usurious interest, and it was proper for the jury in arriving at a verdict to apply that sum on the principal; but where it appears from special findings that the jury also deducted the amounts of interest for-

merly paid by defendant to the bank upon the theory that the note was taken in plaintiff's name pursuant to some agreement between him and the bank to evade the usury laws, a judgment rendered upon such a verdict will be reversed. *Id.*

Vacancy of Highway. See HIGHWAYS.

Valued Policy Act. See INSURANCE, 5, 7.

Vendor and Vendee. See HOMESTEADS, 5. PRINCIPAL AND AGENT, 2, 3. SALES. SPECIFIC PERFORMANCE, 4.

1. Where time is of the essence of a contract for the sale of real estate, and it is agreed that payment is to be made on a certain day, the vendor waives his right to insist on the stipulation by accepting interest after that time. *Merriam v. Goodlett* 384
2. Where a purchaser of property pays the grantor the consideration therefor after he has received actual or constructive notice of a prior right or equity, he is not entitled to the protection which the law affords an innocent purchaser for value. *Germire v. Willy* 349
3. A person's true name was Mary Ann Allely, and she held her real estate by conveyance of record under the name of Mary A. Allely. *Held*, That a judgment against her, indexed and docketed in the office of the clerk of the district court, "*McKaig & Co. v. May Alley*," was not constructive notice to a purchaser of the real estate from Mary Ann Allely. *Phillips v. McKaig* 853
4. The indexes in the office of the register of deeds disclosed conveyances as follows: "—— to Mary A. Allely, deed; Mary A. Allely to Hooper, mortgage; Mary A. Allely to Vickars, mortgage." *Held*, That Vickars, by taking a deed of the real estate from Mary A. Allely, so described in body and acknowledgment of the deed, but signed Mary A. Alley, was not thereby charged with notice that a judgment indexed in the office of the clerk of the district court against May Alley was against Mary A. Allely. *Id.*
5. An action will lie to foreclose the rights of a purchaser in a contract for the sale of real estate, and the court by its judgment may direct the purchaser to comply with the terms of the contract within a reasonable time to be named by the court, or order the premises sold and the proceeds applied to the payment of the judgment. *Gardels v. Klocke* 494
6. In such a case the justice and equity of the case will determine the character of the judgment. *Id.*

7. Where a party purchases a lot on which there is a party wall built by the owner of the adjoining lot, with notice, either actual or constructive, of a contract between his grantor and such adjoining lot owner, that the grantor will pay one-half the costs of constructing the wall whenever he shall use it, the agreement further stipulating that the covenants therein shall extend to and be binding upon each party, his heirs, administrators, and assigns, such purchaser is liable for the amount agreed to be paid by his grantor in case he makes use of the wall. *Garmire v. Willy*, 340

Verdict. See JURY, 1, 2.

1. Cannot be sustained where the evidence in writing shows that it is for a sum much less than the amount due. *Porter v. Sherman County Banking Co.*..... 271
2. The verdict was *held* sufficient in form and substance in a case where it appeared that the name of a defendant had been omitted from the title; that the title was sufficient to identify the verdict with the case; that it was returned and filed in the proper action, and that no objection was made until after the jury had been discharged. *Parrish v. McNeal* 730

Verification. See INDICTMENT AND INFORMATION, 1, 2.

Voluntary Assignments. See FRAUDULENT CONVEYANCES,

4. PREFERRED CREDITORS.

1. Under the provisions of secs. 42 and 43 of the assignment law, the rights of the assignee to recover property fraudulently transferred by the assignor are similar to those of a judgment creditor and must be enforced according to the forms of law. He is not authorized to forcibly seize and take property on the assumption that it was transferred by his assignor in fraud of the rights of creditors. *Brown v. Farmers & Merchants Banking Co.*..... 434
2. Where a chattel mortgage was made and taken by a creditor of the mortgagor upon all his property, its purpose being not only to secure a debt due the mortgagee, but also to secure other creditors of the mortgagor not named therein, whose rights are not expressly reserved from the operation of the assignment law of this state, such mortgage is *held* void as an irregular, prohibited voluntary assignment. *Stewart v. Stewart*..... 553
3. It is the duty of the county judge at the same time he audits and allows a claim against an assigned estate to determine whether or not it is entitled to preference, and if he finds that it is, to order the same paid as a preferred

- claim. His decision is, in effect, a judgment, which is conclusive, unless appealed from. *Anheuser-Busch Brewing Association v. Morris*..... 31
4. Where a bank collects money for another, it holds the same as trustee of the owner, and on the making of an assignment by the bank for the benefit of its creditors the trust character still adheres to the fund in the hands of the assignee, and the owner is entitled to have his claim allowed by the county court as a preferred claim. *Id.*
 5. In such a case, where the owner files his claim with the county judge in the regular way, which is allowed like that of an ordinary creditor, no preference being given, from which allowance no appeal is taken, and he afterwards accepts from the assignee two dividends declared, he waives his right to afterwards insist upon the payment of his claim in full. *Id.*
- Volunteer Evidence.** See TRIAL, 4.
- Vouchers.** See LEGISLATIVE APPROPRIATIONS, 2, 3.
- Wages.** See EXEMPTIONS. MASTER AND SERVANT, 1. QUANTUM MERUIT.
- The evidence in an action for services rendered was insufficient to support a verdict against officers of a company, individually, where the testimony showed that the contract was made with and the work performed for the company. *Imhoff v. House*..... 20
- Waiver.** See INDICTMENT AND INFORMATION, 1, 2. INSURANCE, 3. PLEADING, 9. REVIEW, 38. VENDOR AND VENDEE, 1. WITNESSES, 4.
1. Submission of error proceedings on merits is waiver of defects of parties. *Curtis v. Atkinson*..... 111
 2. A claimant waives his right to have his claim preferred by neglecting to appeal from the order of a county judge allowing it as ordinary claims and accepting dividends from the assignee. *Anheuser-Busch Brewing Association v. Morris*..... 31
- Wills.**
1. In an action to contest a will, the issue being the capacity of the testator, the evidence discussed and set out in the opinion, held sufficient to support a verdict sustaining the will. *James v. Sutton*..... 393
 2. In a contest over the probate of a will the parties objecting to such probate offered evidence tending to show that the testator many years before his death had given one of his children certain lands, describing them, but had failed

to convey the same. *Held*, Properly excluded, because it did not relate to the questions at issue, and if such gift had been made and possession given in pursuance thereof and the conditions complied with, those facts might be shown in a proper case to enforce, quiet, or confirm the title. *Id.*..... 394

Witnesses. See REVIEW, 39, 41, 42. TRIAL, 4.

1. To justify the proving of contradictory statements of a witness for the purpose of impeaching him, the answer of the witness on cross-examination must be material so that the cross-examining party would be allowed to give it in evidence. *Carter v. State*..... 481
2. The presiding judge, of necessity, is vested with a sound judicial discretion as to limiting the cross-examination of a witness, and where the same question has been three times propounded, it is not error to prohibit a like question to be again asked under penalty of forbidding further cross-examination. *Jones v. Stevens*..... 849
3. A person having a direct legal interest in the result of an action in which the adverse party is an administrator of a deceased person is not precluded by section 329 of the Code from testifying to a transaction between himself and such deceased person in case such administrator has first introduced a witness who has testified in regard to the same transaction. *Parriah v. McNeal*..... 727
4. When a person, who is precluded by the provisions of sec. 329 of the Code from testifying against the representative of a deceased person, is permitted, without objection, to testify to a conversation or transaction had with such deceased person, it is a waiver of the benefit of the statute. *Id.*

Words and Phrases.

1. "Convenient." *City of Grand Island v. Oberschulte*..... 699
2. "Crime." *Pounder v. Ashe*..... 570
3. "Criminal negligence." *Chicago, B. & Q. R. Co. v. Lawdauer*..... 643
4. "Fiscal year." *State v. Moore*..... 579
5. "Non-resident." *Pacific R. Co. v. Perkins*..... 456
6. "Protest." *Wood River Bank v. First National Bank of Omaha*..... 744
7. "Totally destroyed." *German Ins. Co. v. Eddy*..... 481
8. "Traffic in intoxicating drinks." *Curtin v. Atkinson*..... 110
9. "Vouchers." *State v. Moore*..... 579

Writs. See JUDGMENTS, 8. SUMMONS.

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